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July 7, 2023

Edythe Nash Gaiser, Clerk
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State Capitol Building, Room E-317
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Charleston, WV 25305

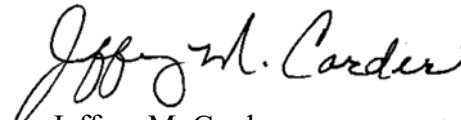
Re: Claimant: Roger Weese
Employer: Harry Green Chevrolet, Inc.
JCN: 2021013416
Appeal No: 22-ICA-247
SC No: 23-340

Dear Edythe Nash Gaiser:

Enclosed please find the original of the "Brief on Behalf of the Respondent, Harry Green Chevrolet, Inc." and "Appendix to the Brief on Behalf of the Respondent" in the above claim.

Thank you for your consideration of this matter.

Very truly yours,



Jeffrey M. Carder

JMC/ces

Enclosure

cc: Harry Green Chevrolet, Inc.
 Kim Strickland, Travelers
 J. Thomas Greene, Jr., Esq.

THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

Roger Weese, Claimant,

Petitioner,

v.

JCN No.: 2021013416

Appeal No.: 22-ICA-247

Supreme Court No.: 23-340

Harry Green Chevrolet, Inc., Employer,

Respondent.

BRIEF ON BEHALF OF RESPONDENT
HARRY GREEN CHEVROLET, INC.

Jeffrey M. Carder *WV Bar ID # 12725*
WILLIAM J. FERREN & ASSOCIATES
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Counsel for Respondent,
Harry Green Chevrolet, Inc.

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I. NATURE OF THE PROCEEDING

This proceeding arises from Claimant's appeal from the West Virginia Intermediate Court of Appeal's Memorandum Decision dated April 10, 2023, which affirmed the Workers' Compensation Board of Review Order dated October 27, 2022, affirming the claims administrator's order dated January 19, 2022, which closed the claim for temporary total disability ("TTD") benefits, and the claims administrator's order dated January 24, 2022, which denied authorization for a repeat lumbar MRI. The claimant herein sustained a compensable right-hand fracture and lumbar muscular strain through the course of his employment. The claimant was treated with physical therapy for his low back symptoms, after which he was referred for evaluation with Dr. Joseph Grady. Dr. Grady assessed the claimant with healed right hand fifth metacarpal fracture and lumbar sprain superimposed upon preexisting multilevel lumbar spondylosis. Dr. Grady concluded that the claimant had reached maximum medical improvement for the compensable injuries and was in need of no further medical treatment under the claim. Because he was found to have reached maximum medical improvement, TTD benefits were suspended pursuant to W. Va. Code §23-4-7a.

Thereafter, the claimant saw his treating physician for follow-up for his lumbar spine where his pain was at a 0 on a 10-point scale with an overall unremarkable physical exam. Dr. Biundo assessed the claimant with a lumbar strain and submitted a request for authorization for a repeat lumbar MRI, noting the repeat lumbar MRI was being requested to evaluate the claimant for lumbar disc herniation. No other medical documentation or records were received during this time.

By claims administrator's order dated January 19, 2022, the claim was closed for TTD benefits, on the basis that no medical evidence had been received demonstrating the claimant remained disabled from work after the notice of suspension was issued. The claimant protested the claims administrator's order. By decision dated October 27, 2022, the Board of Review held the

claim was properly closed for TTD benefits. TTD benefits were properly suspended on the basis of Dr. Grady's finding the claimant had reached maximum medical improvement for the compensable right hand and low back injuries, and the claimant failed to introduce any evidence to refute of Dr. Grady's findings.

By claims administrator's order dated January 24, 2022, the claims administrator denied Dr. Biundo's request for a repeat lumbar MRI. The claimant protested this claims administrator's order. The Board of Review cited to Dr. Biundo's request in which Dr. Biundo indicated the repeat MRI was required for claimant's lumbar herniated disc. However, lumbar herniated disc was not a compensable diagnosis in the claim, and there was no evidence to suggest that any medical physician had requested to add lumbar disc herniation to the compensable claim. Accordingly, the Board of Review affirmed the January 24, 2022 claims administrator's order on the basis the claimant failed to demonstrate that the request for a repeat lumbar MRI was reasonably related to and medically necessary to treat a compensable condition recognized under the claim.

On appeal, the claimant argues the Board of Review erred because he had not been released to return to work by his treating physician and was still in need of additional treatment including a repeat lumbar MRI. However, the Intermediate Court of Appeals found no error in the Board of Review's conclusions. The only medical evidence of record submitted after Dr. Grady's report were records from claimant's treating physician demonstrating an unremarkable physical exam. Whereas the claimant introduced Dr. Biundo's request for a repeat lumbar MRI, the Intermediate Court found the evidence of record demonstrates lumbar herniated disc is not a compensable condition under the claim and no medical provider has submitted a Diagnosis Update requesting it be added to claim. Therefore, there is no evidence to indicate the claimant remains disabled as a result of the compensable conditions under the claim, nor is there evidence demonstrating the request for a repeat

lumbar MRI was medically necessary or reasonably related to the compensable conditions under the claim.

Because there is no medical evidence of record to refute Dr. Grady's medical finding the claimant had reached maximum medical improvement nor any evidence demonstrating the claimant remains disabled as a result of the compensable conditions under the claim, the Intermediate Court of Appeals did not err in affirming the Board of Review Order affirming the claims administrator's order that closed the claim for TTD benefits. Moreover, because Dr. Biundo's request for a repeat lumbar MRI was not made in relation to or to medically treat the compensable conditions under this claim, the Intermediate Court did not err in upholding the Board of Review's Order that affirmed the claims administrator's order denying the request for a repeat lumbar MRI. Accordingly, the Respondent hereby moves this Honorable Court for entry of a decision affirming the Intermediate Court of Appeals decision dated April 10, 2023.

II. STATEMENT OF THE CASE

The claimant herein, Roger Weese, is employed as a mechanic for Harry Green Chevrolet. [App. 1]. The claimant completed an Employees' and Physicians' Report of Occupational Injury on January 29, 2021, in which he reported an occupational injury to his right hand and back on January 4, 2021 when he "smashed [his] right hand and pulled back." [App. 1]. Section II of the form, the Physician's Section was completed at UHC Orthopedics. The provider diagnosed the claimant with a fracture of the metacarpal of the right hand. [App. 1].

The claimant first sought treatment at the emergency department at WVU Medicine on January 20, 2021, where he reported complaints of low back pain radiating down the right leg following an injury at work on January 4, 2021. [App. 2]. A history of low back pain was noted. [App. 2]. X-rays were taken revealing no acute abnormalities. [App. 3]. The claimant was diagnosed

with low back pain and right-sided sciatica. [App. 2]. He was given prescriptions for Robaxin and Prednisone and a referral to Dr. Biundo for follow-up. [App. 2].

The claimant attended the referral with Dr. Russell Biundo on January 26, 2021. [App. 4]. The claimant reported complaints of right-hand pain and low back pain radiating into his right leg. [App. 4]. The claimant traced the onset of his symptoms to the January 4, 2021 injury in which his right hand got in a turning tire. [App. 4]. The claimant was diagnosed with lumbar radiculopathy, possible lumbar herniated disc, right hand pain, and a suspected metacarpal bone fracture. [App. 4]. X-rays of the claimant's right hand and a lumbar spine MRI were recommended. [App. 4].

By claims administrator's order dated February 1, 2021, the claim was held compensable for a right hand and low back injury. [App. 5]. The claimant was granted temporary total disability ("TTD") benefits from January 12, 2021 through February 1, 2021. [App. 5].

The claimant underwent an MRI of the lumbar spine on February 5, 2021, which revealed multilevel degenerative changes with disc extrusion and annular tear at the L4-5. [App. 6].

Dr. Christopher Martin at WVU Occupational Medicine evaluated the claimant at the employer's request on April 13, 2021. [App. 7]. Dr. Martin reviewed the medical treatment history. [App. 7]. He opined the claimant had not yet reached maximum medical improvement for the hand fracture. [App. 7]. Dr. Martin explained that the type of fracture was a severe fracture with comminution and angulation and objective imaging per the reports has not documented full healing. [App. 7]. He recommended consideration of hand strengthening either separately or in conjunction with the physical therapy recommended for his low back strain. [App. 7]. Regarding the low back injury, Dr. Martin opined the claimant's work injury had resulted in a sprain-type of injury that was muscular in nature. [App. 7]. Dr. Martin explained that the claimant's MRI findings are very

common, nonspecific, age-related findings that are not related to the compensable injury. [App. 7]. Dr. Martin recommended 4 to 8 weeks of physical therapy. [App. 7].

The claimant presented for followed with Rachel Gregis, APRN on August 4, 2021. [App. 8]. Records indicated the claimant had previously reported to the emergency department on July 26, 2021, for complaints of worsening low back pain radiating into the bilateral lower extremities. [App. 8]. The claimant was treated with injections and oral steroids. Upon follow-up with Nurse Gregis, the claimant complained of constant numbness and weakness in the right lower extremity. [App. 8]. Nurse Gregis' assessment was lumbar strain, lumbar radiculopathy, and lumbar herniated disc. She recommended injections at L4-5. [App. 8].

The claimant returned to Nurse Gregis on September 8, 2021. [App. 9]. The claimant had continued to improve following his last visit and elected not to undergo the previously recommended injections. [App. 9]. The claimant reported no low back pain. [App. 9]. The claimant wished to return to work but was concerned about re-injury. [App. 9]. Nurse Gregis recommended a referral to physical therapy. [App. 9].

The claimant attended physical therapy through Healthworks. [App. 10]. The October 29, 2021 plan of care and reevaluation report indicates the claimant reported no radicular symptoms and his condition had improved with 6 weeks of work conditioning. [App. 10]. The Healthworks physical therapist recommended 4 additional weeks of work condition for a full return to work. [App. 10].

Dr. Joseph Grady evaluated the claimant on November 1, 2021. [App. 11]. The claimant did not report any problems involving his right hand, but he still complained of discomfort in the low back. [App. 11]. Dr. Grady's assessment was healed right fifth metacarpal fracture and lumbar sprain superimposed on preexisting multilevel lumbar spondylosis. [App. 11]. Dr. Grady found the claimant

to be at maximum medical improvement in regard to his compensable right hand and low back injuries and in need of no further medical treatment. [App. 11].

By claims administrator's order dated November 30, 2021, TTD benefits were suspended on the basis of Dr. Grady's report. [App. 12].

The claimant returned to UHC on November 10, 2021 where he was seen by Gary Barcinas, PA-C, as follow-up for his low back complaints. [App. 13]. The claimant's reported pain level was 0 out of 10. [App. 13]. The claimant's physical examination was unremarkable outside of an antalgic gait pattern. [App. 13]. The assessment was lumbar strain and lumbar herniated disc. Mr. Barcinas ordered a repeat lumbar MRI. [App. 13]. Mr. Barcinas submitted an authorization request for a lumbar spine MRI dated November 17, 2021 and a follow-up appointment with Dr. Biundo. [App. 14].

Soon after, Dr. Biundo faxed in a request for a lumbar MRI before the claimant returned to work. [App. 15]. Under the "Reason for Exam" section, Dr. Biundo identified the claimant's lumbar herniated disc as the reason for the MRI. [App. 15].

On January 19, 2022, a claims administrator's order was issued closing the claim for TTD benefits on the basis that no evidence had been received demonstrating the claimant remained disabled as a result of the compensable injury under the claim. [App. 16]. The claimant protested this order.

By claims administrator's order dated January 24, 2022, authorization for a repeat lumbar MRI was denied. [App. 17]. The claimant also protested this order.

By Order dated October 27, 2022, the Workers' Compensation Board of Review affirmed the January 19, 2022 claims administrator's order closing the claim for TTD benefits as well as the claims administrator's order dated January 24, 2022 which denied the request for a repeat lumbar MRI. [App. 18]. With respect to the TTD issue, the Board found that evidence showed the claimant had reached

maximum medical improvement for the compensable right hand and low back injuries and was in need of no further treatment. [App. 18]. Whereas Dr. Biundo had requested a lumbar MRI for further evaluation of the claimant's lumbar herniated disc, lumbar herniated disc is not a compensable condition under this claim, and there was no evidence to suggest any medical provider had even requested lumbar herniated disc be added as a compensable diagnosis. [App. 18]. Because Dr. Grady concluded the claimant had reached maximum medical improvement for the compensable conditions and there was no evidence of record to refute Dr. Grady's findings, the Board affirmed the January 19, 2022 order. [App. 18]. As far as the claims administrator's order denying the request for a repeat lumbar MRI, Dr. Biundo indicated in his request that the repeat MRI was for the claimant's lumbar herniated disc, and lumbar herniated disc is not a compensable condition under this claim. [App. 18]. The Board found there was no evidence to indicate that a repeat MRI was medically necessary to treat the compensable conditions under this claim, and therefore affirmed the January 24, 2022 order. [App. 18].

By memorandum decision issued on April 10, 2023, the Intermediate Court of Appeals affirmed the October 27, 2022 Board of Review Order. [App. 19]. The Intermediate Court found that because the evidence demonstrated the claimant had reached maximum medical improvement for the compensable conditions under the claim and there was no evidence of record to refute Dr. Grady's findings, the Board of Review did not err in affirming the January 19, 2022 claims administrator's order, which closed the claim for TTD benefits. [App. 19]. The Intermediate Court further found Dr. Biundo's request for a repeat lumbar MRI was for evaluation of a lumbar herniated disc. [App. 19]. However, herniated lumbar disc is not a compensable condition, and there was no evidence to suggest any medical provider had even requested lumbar herniated disc be added to the claim as a compensable diagnosis. [App. 19]. Therefore, the Intermediate Court found the Board of Review was

not wrong in affirming the January 24, 2022 claims administrator's order, denying the request for authorization for a repeat lumbar MRI. [App. 19].

III. SUMMARY OF ARGUMENT

The Intermediate Court of Appeals did not err in affirming the Board of Review Order dated October 27, 2022, which affirmed the claims administrator's order dated January 19, 2022, closing the claim for temporary total disability ("TTD") benefits, and the claims administrator's order dated January 24, 2022, denying the request for authorization for a repeat lumbar MRI. The claimant sustained a compensable right-hand fracture and lumbar muscular strain injury. The claimant was referred for evaluation with Dr. Grady who found the claimant had reached maximum medical improvement for the compensable right-hand fracture and low back injuries with no further treatment required. By claims administrator's order dated November 30, 2021, TTD benefits were properly suspended pursuant to W. Va. Code §23-4-7a. Thereafter, the claimant failed to submit medical evidence demonstrating that he remained temporarily and disabled from work as a result of the compensable right-hand fracture and lumbar muscular strain injury under the claim. Therefore, the claim administrator's order was correct in closing the claim for TTD benefits.

Upon appeal, the Intermediate Court found that because the evidence demonstrated the claimant had reached maximum medical improvement for the compensable conditions under the claim and there was no evidence of record to refute Dr. Grady's findings, the Board of Review did not err in affirming the January 19, 2022 claims administrator's order, which closed the claim for TTD benefits.

Furthermore, the Intermediate Court of Appeals did not err in affirming the Board of Review Order dated October 27, 2022, insofar as it affirmed the claims administrator's order which denied the request for authorization for a repeat lumbar MRI. Dr. Biundo indicated on his request

that the purpose for the repeat lumbar MRI was for the claimant's lumbar herniated disc. West Virginia workers' compensation law requires a claims administrator to provide medically related and reasonably required medical treatment for the compensable condition(s) sustained in the course of and resulting from employment. Herniated lumbar disc is not a compensable condition, and there is no evidence to suggest any medical provider had even requested lumbar herniated disc be added to the claim as a compensable diagnosis. Therefore, the Intermediate Court found the Board of Review was not wrong in affirming the January 24, 2022 claims administrator's order, as there was no evidence of record to indicate that a repeat MRI was medically necessary to treat the compensable conditions under this claim. Accordingly, the employer moves this Honorable Court for entry of a decision affirming the Intermediate Court of Appeals decision dated April 10, 2023.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents do not request oral argument as oral argument would be unnecessary and inappropriate under the standard set forth by Rule 19 of the *West Virginia Rules of Appellate Procedure*. Respondents instead request entry of a memorandum decision on the merits as presented in the parties' individual briefs.

V. ARGUMENT

A. STANDARD OF REVIEW

West Virginia Code § 23-5-15 sets forth the applicable standard of review regarding workers' compensation appeals, which provides that "[i]n reviewing a decision by the Board of Review, the Supreme Court of Appeals shall consider the record provided by the board and give deference to the board's findings, reasoning, and conclusions, in accordance with subsection (d) and (e) of this section", as follows:

(d) 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.

(e) If the decision of the board effectively represents a reversal of a prior ruling of either the commission or 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 provisions, is clearly the result of erroneous conclusions of law, or is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision. 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 so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision.

The Supreme Court of Appeals shall reverse a final order only if the decision is: (1) in violation of statutory provisions; (2) in excess of the statutory authority or jurisdiction of the Administrative Law Judge; (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. W. Va. Code § 23-5-12(b). As previously recognized in *Justice v. West Virginia Office Insurance Commission*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012), the Supreme Court of Appeals

applies a *de novo* standard of review to questions of law arising in the context of decisions issued by the Board of Review. See also *Davies v. W. Va. Off. of Ins. Comm'r*, 227 W. Va. 330, 334, 708 S.E.2d 524, 528 (2011).

Here, the Intermediate Court of Appeals was not clearly wrong in affirming the Board of Review Order decision dated October 27, 2022, which affirmed the claims administrator's orders closing the claim for TTD benefits and denying the request for authorization for a repeat lumbar MRI. Accordingly, the Intermediate Court's decision should not be disturbed on appeal.

B. The Intermediate Court of Appeals did not err in affirming the Board of Review Order which affirmed the claim administrator's order closing the claim for TTD benefits.

Pursuant to W. Va. § 23-4-1c, employees who have received personal injuries in the course of and resulting from their covered employment are entitled to payment of temporary total disability ("TTD") benefits for periods of disability lasting longer than three (3) days. *Allen v. State Workers' Compensation Commissioner*, 173 W. Va. 238, 314 S.E.2d 401 (1984). TTD benefits are paid at 66 2/3% of the employee's average weekly wage not to exceed the State maximum rate. These benefits are paid so long as evidence demonstrates the injured worker remains disabled from returning to work, or the claimant has reached or exceeded the maximum 104 weeks of benefits permitted under the Statute. TTD benefits may be suspended then closed so long as supported by medical evidence when: 1.) the physician or physicians selected by the commission conclude that the claimant has reached his or her maximum degree of improvement; 2.) When the authorized treating physician advises the claimant has reached his or her maximum degree of improvement; 3.) When other evidence justifies a finding that the claimant has reached his or her maximum degree of improvement; or 4.) When other evidence submitted or otherwise obtained justifies a finding that the claimant has engaged or is engaging in abuse. In all cases, a finding that the claimant has reached his or her maximum degree of

improvement terminates the claimant's entitlement to temporary total disability benefits regardless of whether the claimant has been released to return to work. Under no circumstances shall a claimant be entitled to receive temporary total disability benefits either beyond the date the claimant is released to return to work or beyond the date he or she actually returns to work. See *W. Va. Code § 23-4-7a(e)*.

The claimant herein sustained a compensable right-hand fracture and lumbar muscular strain. The claimant was treated with physical therapy for his low back symptoms, after which he was referred for evaluation with Dr. Joseph Grady. On November 1, 2021, Dr. Grady assessed the claimant with healed right hand fifth metacarpal fracture and lumbar sprain superimposed upon preexisting multilevel lumbar spondylosis. Dr. Grady concluded that the claimant had reached maximum medical improvement for the compensable injuries and was in need of no further medical treatment under the claim. Because the claimant was found to have reached maximum medical improvement, TTD benefits were properly suspended pursuant to *W. Va. Code §23-4-7a*.

Thereafter, the claimant saw his treating physician for follow-up for his lumbar spine where his pain was at a 0 on a 10-point scale with no radicular symptoms, noted overall to be an unremarkable physical exam. The claimant was assessed with a lumbar strain and Dr. Biundo submitted a request for authorization for a repeat lumbar MRI, noting lumbar herniated disc as the basis for the request. By claims administrator's order dated January 19, 2022, the claim was closed for TTD benefits, on the basis that no medical evidence had been received demonstrating the claimant remained disabled from work after the notice of suspension was issued. The claimant protested the claim's closure for TTD benefits.

By decision dated October 27, 2022, the Board of Review ruled the claim had been properly closed for TTD benefits. Dr. Grady found the claimant had reached maximum medical improvement for the compensable right hand and low back injuries. Therefore, TTD benefits were properly

suspended pursuant to W. Va. Code §23-4-7a. Thereafter, no evidence was introduced to refute of Dr. Grady's finding that the claimant had reached maximum medical improvement. Accordingly, the Intermediate Court of Appeals held the claimant failed to introduce any evidence indicating he remained temporarily and totally disabled as a result of his compensable work injury after Dr. Grady had found him at maximum medical improvement, and properly affirmed the Board of Review's conclusions.

In support of his appeal, the claimant argues because he was still in need of additional treatment including a repeat lumbar MRI, the Intermediate Court erred in affirming the decision closing for TTD benefits. Whereas the claimant submitted a physician's request for a repeat lumbar MRI, Dr. Biundo indicated he was requesting a lumbar MRI for evaluation of a lumbar herniation disc. Lumbar disc herniation is not a compensable condition under the claim, and there is no evidence to indicate any physician has diagnosed the claimant in relation to the compensable work injury subject to claimant's claim, as no physician had submitted a diagnosis update requesting lumbar disc herniation be added to the claim. Furthermore, Dr. Biundo did not refute Dr. Grady's finding that the claimant had reached maximum medical improvement for the compensable right-hand fracture and low back strain under the claim.

The Intermediate Court of Appeals did not err in affirming the Board of Review Order affirming the claims administrator's order that closed the claim for TTD benefits, as there was no medical evidence of record to refute the finding the claimant had reached maximum medical improvement and demonstrating the claimant remained disabled as a result of the compensable conditions under the claim after he had been found at maximum medical improvement. Accordingly, the Respondent hereby moves this Honorable Court for entry of a decision affirming the Intermediate Court of Appeals decision dated April 10, 2023.

C. The Intermediate Court of Appeals did not err in affirming the Board of Review Order which affirmed the claim administrator's order denying the request for authorization for a repeat lumbar MRI.

The Workers' Compensation Fund was created and exists only for the payment of compensation for work-related injuries and is not a health and accident fund. *Barnett v. State Workmen's Compensation Comm'r*, 153 W. Va. 796, 799, 172 S.E.2d 698, 700 (1970). "...[T]he employer, by subscribing to the workmen's compensation fund, does not thereby become the employee's insurer against all ills or injuries, which may befall him." *Jordan v. State Workmen's Compensation Comm'r*, 156 W. Va. 159, 165, 191 S.E.2d 497, 501 (1972) (citing *Barnett v. State Workmen's Compensation Comm'r*, 153 W. Va. 796, 172 S.E.2d 698 (1970) and *James v. Rinehart & Dennis Co., Inc.*, 113 W. Va. 414, 168 S.E. 482 (1933)).

The issue in the instant claim involves a request for treatment. When read *in pari materia*, West Virginia Code §§ 23-4-1 and 23-4-3 provides that benefits for medical treatment can be authorized only for injuries both occurring in the course of and also resulting from the claimant's employment. Pursuant to West Virginia Code § 23-4-3(a)(1) (2005), the Claims Administrator shall disburse and pay from the fund for personal injuries to such employees such sums for health care services, among other things, as may be reasonably required.

Here, the Intermediate Court did not err in affirming the Board of Review Order, which affirmed the claims administrator's order denying the request for authorization for a repeat lumbar MRI. The requesting physician, Dr. Biundo indicated on the face of his request that the purpose for the repeat lumbar MRI was to evaluate claimant's lumbar herniated disc. As indicated above, West Virginia workers' compensation law requires a claims administrator to provide medically related and reasonably required medical treatment for the compensable condition(s) sustained in the course of and resulting from employment. Herniated lumbar disc is not a compensable condition under the

claim, and there is no evidence to suggest any medical provider had even requested lumbar herniated disc be added to the claim as a compensable diagnosis. Therefore, the Intermediate Court was correct in affirming the Board of Review Order, which affirmed the January 24, 2022 claims administrator's order, as there was no evidence to indicate that a repeat MRI was medically necessary to treat the compensable conditions under this claim.

VI. CONCLUSION

Based on the foregoing, the employer submits that the Intermediate Court of Appeals did not err in affirming the Board of Review Order dated October 27, 2022, which affirmed the claims administrator's order dated January 19, 2022, closing the claim for temporary total disability ("TTD") benefits, and the claims administrator's order dated January 24, 2022, denying the request for authorization for a repeat lumbar MRI. Accordingly, the employer respectfully requests this Honorable Court for entry of an order affirming the Intermediate Court of Appeals decision dated April 10, 2023.

Respectfully submitted,
Harry Green Chevrolet, Inc.,
By Counsel



Jeffrey M. Carder WV Bar ID # 12725

THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

Roger Weese, Claimant,

Petitioner,

v.

JCN No.: 2021013416

Appeal No.: 22-ICA-247

Supreme Court No.: 23-340

Harry Green Chevrolet, Inc., Employer,

Respondent.

CERTIFICATE OF SERVICE

I, Jeffrey M. Carder, attorney for the Respondent, Harry Green Chevrolet, Inc., hereby certify that a true and exact copy of the foregoing “Brief on Behalf of Respondent, Harry Green Chevrolet, Inc.” was served upon the Petitioner by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 7th of July, 2023 addressed as follows:

J. Thomas Greene, Jr., Esquire
Bailey, Stultz & Greene, PLLC
P.O. Drawer 1310
122 Court Avenue
Weston, West Virginia 26452



Jeffrey M. Carder WV Bar ID # 12725