

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Nov 02 2023  
02:52PM EDT  
Transaction ID 71302149

---

CHARLESTON

---

JOHN J. DELSIGNORE,  
PETITIONER

v.

SUPREME COURT NO.: unassigned

ICA No: 22-ICA-331

JCN: 2021013896

DOI: 01/07/2021

TIMBERLINE LOGGING ENTERPRISES, LLC,  
RESPONDENT.

---

PETITION FOR APPEAL  
From a Decision of the  
INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA  
Issued on the  
5<sup>th</sup> day of September, 2023

---

J. Thomas Greene, Jr.  
T. Colin Greene  
Bailey, Stultz, & Greene, PLLC  
P. O. Drawer 1310  
Weston, WV 26452  
State Bar ID 1477  
State Bar ID 13314  
Telephone 304-269-1311  
tgreene@baileystultz.com  
Attorney for Petitioner  
John J. Delsignore

Jeffrey M. Carder, Esq.  
William J Ferren & Associates  
314 Forest Cir  
South Charleston, WV 25303  
State Bar ID 12725  
Telephone 304-841-4451  
jeffreycarder@aol.com  
Attorney for Respondent  
Timberline Logging Enterprises, LLC

TABLE OF CONTENTS

NATURE OF CASE AND KIND OF PROCEEDING.....1-2  
STATEMENT OF FACTS .....2-8  
ASSIGNMENT OF ERROR RELIED UPON FOR REVERSAL.....8  
STATEMENT REGARDING ORAL ARGUMENT AND DECISION .....8  
POINTS OF LAW AND CITATION OF AUTHORITY .....9-10  
ARGUMENT.....10-17  
PRAYER.....17-18  
CERTIFICATE OF SERVICE .....18  
APPENDIX.....19  
INDEX .....20

TABLE OF AUTHORITIES

CASES

Pripich v. State Comp. Comm’r., 112 W.Va. 540, 166 S.E. 4 (W.Va., 1932)..... 12  
Moore v. ICG Tygart Valley, LLC (W. Va. 2022).....14  
Emmel v. State Comp. Dir., 150 W.Va. 277, 145 S.E. 2d 29 (1965).....13  
Ramey v. S.C.C., 150 W. Va. 402, 146 S.E. 2d 479 (1966).....15  
Machala v. S.C.C., 109 W. Va. 413, 155 S.E. 2d 169 (1930)

STATUTES

West Virginia Code §23-4-1g(a) ..... 17  
West Virginia Code §23-5-12(b)..... 16  
West Virginia Code § 23-5-12a(b) (2022).....16-17  
West Virginia Code §23-4-3 and 85 CSR 20 .....13

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

---

CHARLESTON

---

JOHN J. DELSIGNORE,  
PETITIONER

v.

TIMBERLINE LOGGING ENTERPRISES, LLC,  
RESPONDENT.

SUPREME COURT NO.: unassigned

ICA No: 22-ICA-331

JCN: 2021013896

DOI: 01/07/2021

---

FROM THE INTERMEDIATE COURT  
OF APPEALS OF WEST VIRGINIA

---

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, John J. Delsignore, respectfully represents that he is aggrieved by the Decision of the Intermediate Court of Appeals of West Virginia dated September 5, 2023, which affirmed the Order of the West Virginia Workers' Compensation Board of Review dated December 2, 2022, which affirmed an order of the Claims Administrator

dated June 3, 2022, which denied adding right ankle subtalar joint arthritis, left hip joint pain, and low back pain with left side sciatica as compensable conditions within his claim. Your claimant and Petitioner, John Delsignore, respectfully asserts that the Decision of the Intermediate Court of Appeals of West Virginia dated September 5, 2023, is clearly wrong in light of the reliable, probative and substantial evidence on the whole record.

## II.

### STATEMENT OF FACTS

John J. Delsignore was injured in the course of and resulting from his employment with Timberline Logging Enterprises, LLC, while working for Timberline as a “tree feller”. As he testified at his deposition on May 23, 2022, “I cut an oak tree down, and a limb broke out of it and caught a hickory tree, and broke it out and threw it back at me. And I went to run out—run out of the way. When I ran out of the way, the limb caught another tree, and it swung it around at me and caught me in the hip. Brushed down my hip and side and it tore my—half hit me—Kevlar pouch off my side, and broke my ankle. My right ankle.” (App. #13) Mr. Delsignore was transported to Garrett County Regional Medical Center in Oakland, Maryland from his worksite by personal vehicle to obtain emergency care for his injuries. He was seen on January 7, 2021 at Garrett County Regional Medical Center Emergency Department where he presented with pain in his right ankle, left elbow, and back. The Emergency Department assessment was trimalleolar fracture-dislocation of the right ankle. (App. #1) He completed an Employees’ and Physicians’ Report of Occupational Injury or Disease on January 10, 2021, stating that he had conditions of S82.851A, S30.0xxA, and Z20.822, as a direct result of his occupational injury. (App. #2) On February 4, 2021, the Claims Administrator held Mr. Delsignore’s claim compensable for the condition of displaced trimalleolar fracture of the right lower leg and contusion of the lower

spine and pelvis. (App. #3) He underwent emergency surgery with a pinning procedure on the day of injury. Dr. Dona Alvarez performed his surgery. (App. #4)

Mr. Delsignore returned to Dona Alvarez, M.D., Orthopedic Surgeon with Garret County Regional Hospital, on May 3, 2021. It was noted that she had performed an Open Reduction and Internal Fixation (ORIF) of his right ankle on January 7, 2021 and assessment was closed fracture of the right ankle with routine healing. (App. #5) He returned to Dr. Alvarez on June 16, 2021. Dr. Alvarez wrote, “examination today confirms the patient continues to have swelling of the right ankle only 15 of dorsiflexion 20 plantarflexion. Limited subtalar motion. [ . . . ] Standing exam there is tenderness in the SI joint and low back.” She stated that Mr. Delsignore was having difficulty with inclines or negotiating steps due to his right ankle discomfort and restriction of motion. She stated, “Clinically this patient has early osteoarthritis of the right ankle due to his injury.” Assessment was closed fracture-dislocation of the right ankle with routine healing, back pain with left-sided sciatica, and post-traumatic arthritis of the right ankle. In her treatment notes, Dr. Alvarez stated that Mr. Delsignore had “significant limitation of activities” and was “having sciatic pain in his left buttock and leg.” She stated that he was to continue with aggressive physical therapy, but noted that he would likely have restriction of motion and possibly even require future surgeries for his right ankle. She wrote that Mr. Delsignore had early osteoarthritis of the right ankle due to this compensable injury of January 7, 2021. (App. #6)

Christopher Martin, M.D. performed an IME on July 20, 2021. Assessment was trimalleolar fracture of the right ankle and contusions of the posterior torso and right flank. He noted that Mr. Delsignore began physical therapy in February of 2021, and a PT note dated May 13, 2021 stated that his “left hip is more bothersome this morning than it has been with muscular

tightness up into the low back.” He noted that nursing notes from Mr. Delsignore’s initial Emergency Department treatment stated that he reported complaints of right ankle, left elbow, and back pain and the WC-1 listed right leg, low back, pelvis “although the patient described the body parts injured as right ankle, left elbow, left hip, lower back, ribs, lower.” Dr. Martin opined that there was no evidence to support a diagnosis regarding Mr. Delsignore’s pelvis, stating “this is not a part of the body that the patient himself describes as being affected in the WC-1”, despite stating above that Mr. Delsignore had related that his “left hip” was injured. He ascribed Mr. Delsignore’s lower back pain to “activities performed subsequent to the date of injury.” Dr. Martin stated that Mr. Delsignore had sustained contusions to the posterior torso in his work injury. (App. #7)

Dr. Martin opined that he found no evidence to support that Mr. Delsignore currently had post-traumatic arthritis and that it was not documented by x-rays he reviewed, but noted that he did not have the report from the most recent x-ray. He stated that Dr. Alvarez had not documented arthritis in the study she reviewed. He reported that Mr. Delsignore was at increased risk of developing post-traumatic arthritis and that it should be regarded as a consequence of his compensable injury. He stated that he did not believe Mr. Delsignore could ever return to his pre-injury occupation, as that required prolonged walking on uneven ground in remote locations while carrying extensive heavy equipment. He found that Mr. Delsignore had fully recovered from his posterior torso contusions without residual impairment. He stated that Mr. Delsignore should get a second opinion from an Orthopedic Surgeon regarding his ankle fracture, and if no additional treatment was recommended, then he would find Mr. Delsignore to have reached MMI. (Id.)

Mr. Delsignore returned to Dr. Alvarez on August 16, 2021. She again found that Mr. Delsignore's severe fracture-dislocation of the right ankle demonstrated early osteoarthritis which she specifically related to his January 7, 2021 work injury. It was reported that an x-ray of the right ankle confirmed a negative finding of avascular necrosis. She opined that Mr. Delsignore's left groin pain, lumbar pain, and right ankle pain were the result of his compensable injury. (App. #8) On September 27, 2021, Dr. Alvarez noted that Mr. Delsignore had considerable discomfort in his left groin and in his low back, with left leg discomfort. She noted that he had difficulty ambulating on uneven ground. She recommended a custom orthotic and a "Richie Style" brace for Mr. Delsignore's right ankle due to post-traumatic arthritis pain and instability. (App. #9)

Dr. Martin performed an IME re-evaluation on December 1, 2021. Mr. Delsignore presented with right ankle pain, back pain, and left hip pain. It was reported that his inversion and eversion of his right foot had gotten worse, and he noted ongoing difficulty walking on the right foot due to increased pain. Mr. Delsignore stated that he experienced lower back pain and left hip pain, especially when walking uphill. He reported "knife-like stabbing pain" in his right ankle if he moves it awkwardly, such as on uneven ground. He stated that he also periodically experiences pain in his inner thigh, sometimes into his left knee. Dr. Martin noted that Mr. Delsignore had a right-sided limp, and could only perform a half-squat due to left lower back pain. Dr. Martin agreed with Dr. Alvarez's recommendation for the ankle brace, and stated that when the brace wears out, it will require replacement. He again opined that Mr. Delsignore had sustained no spinal or pelvic injury on January 7, 2021 and that the lumbar x-rays of his date of injury did not reveal evidence of trauma. He found Mr. Delsignore to have reached MMI with 5% whole person impairment for his right ankle injury. (App. #10)

Dr. Dona Alvarez testified at deposition on April 7, 2022. She stated that she is a board-certified orthopedic surgeon with 31 years of experience. She stated that Mr. Delsignore presented to the Emergency Department on January 7, 2021 with multiple injuries, and that “the most outstanding was a fractured and dislocated right ankle.” She testified that on January 8, 2021, she again examined Mr. Delsignore and noticed a significant contusion of his flank and left greater iliac crest. She had lumbar x-rays performed this day to further examine his symptoms, and stated that “to the extent of our study, there were no fractures.” She emphasized by stating that it was “significant to know” that although Mr. Delsignore’s most urgent issue was his broken ankle when he presented to the Emergency Department, he had ongoing complaints of left hip and back pain from the time he came to the ED and continually thereafter. Therefore, on August 16, 2021, she recommended x-rays of his left pelvis, hip, and lumbar spine. She stated that she saw Mr. Delsignore routinely, and that on February 2, 2022, more than a year post-injury, he continued to have a low back and left hip injury. She stated that it was her professional medical opinion that Mr. Delsignore needed x-rays of his left pelvis, hip, and lumbar spine as a result of his January 7, 2021 work injury. On cross-examination, she stated that Mr. Delsignore was primarily being seen post-operatively for his right ankle fracture, but that he continued to have considerable symptoms and complaints of back and hip pain. (App. #11) Dr. Alvarez submitted a Diagnosis Update form dated April 27, 2022 requesting that right ankle subtalar joint arthritis, left hip joint pain, and low back pain with left-sided sciatica be added to Mr. Delsignore’s claim as compensable conditions. (App. #12)

Mr. Delsignore testified by deposition on May 23, 2022. He stated that the limb that hit him struck him in the hip and broke his ankle. He stated that after his right ankle surgery on January 7, 2021, he went to physical therapy for his foot, back, and hip from February of 2021



through October 21, 2021. He stated that he initially was receiving physical therapy for his ankle, hip, and back, but that the treatment for his hip and back was cut off when his physical therapists were “told not to do his hip and back anymore.” He stated that he was experiencing consistent pain in his left hip and down his left leg. He stated that Dr. Alvarez had requested x-rays of his left hip which were denied, and stated that he did not receive these x-rays after they were denied. He stated that he had no history of problems with his left hip, pelvis, or low back prior to his work injury on January 7, 2021. Mr. Delsignore made an unsuccessful return to work attempt in March, 2022 because Timberline had no light duty work available to accommodate his medical restrictions. He noted that he was in constant pain during this effort. He stated that when his foot would begin to hurt, it would make his hip and back hurt. On cross-examination, when asked whether he was released to return to work by Dr. Alvarez, he stated, “I guess I was released by the insurance company to return. So, I guess, yes. I guess she released me too. I don’t [know]”. He stated that Timberline had no work available for him in his condition and could not accommodate his restrictions. (App. #13)

On June 3, 2022, the Claims Administrator issued an Order denying Dr. Alvarez’s request to add right ankle subtalar joint arthritis, left hip joint pain, and low back pain with left side sciatica as compensable conditions within his claim stating “as these conditions are not causally related to the 01/07/21 injury.” (App. #14) On December 2, 2022, the West Virginia Workers’ Compensation Board of Review issued an order affirming this denial. The Board stated that Dr. Alvarez did not document a finding of arthritis by x-ray, and that x-rays were interpreted to be negative for avascular necrosis. Dr. Martin, the insurance carrier’s independent examiner, stated that post-traumatic arthritis would not be expected to occur so close to the date of injury. Therefore, the Board concluded that the evidence did not support a diagnosis of right ankle post-

traumatic arthritis. Regarding left hip and back pain, the Board stated that pain is a symptom, not a diagnosis, and therefore determined to affirm the claims administrator's June 3, 2022 order. (App. #15) On September 5, 2023, the Intermediate Court of Appeals affirmed the Board's June 3, 2022 Order. It stated that no x-rays had been interpreted to show arthritis in Mr. Delsignore's right ankle, and Dr. Martin had opined that post-traumatic arthritis/right subtalar joint arthritis would not be expected to develop so quickly after a compensable injury. (App. #16) In so doing, the Board and the Intermediate Court of Appeals both elected to credit Dr. Martin's opinions regarding Mr. Delsignore over those of Dr. Alvarez, a Board-Certified Orthopedic Surgeon with 31 years experience who treated Mr. Delsignore consistently from January 7, 2021 to the present.

### III.

#### ASSIGNMENT OF ERROR RELIED UPON FOR REVERSAL

The Intermediate Court of Appeals of West Virginia was clearly wrong in its Decision of September 5, 2023, affirming the denial of the addition of right ankle subtalar joint arthritis, left hip joint pain, and low back pain with left side sciatica as compensable conditions within this claim.

### IV.

#### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Your claimant and Petitioner, John J. Delsignore, respectfully submits that the issues herein do not require or would be aided by oral argument and present no new issue of law. Therefore, it is requested that a Memorandum Decision be issued herein.

V.

POINTS OF LAW AND CITATIONS TO AUTHORITY

- 1) The Board of Review shall reverse, vacate or modify the order or decision of the administrative law judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge's findings are:
  1. In violation of statutory provisions; or
  2. In excess of the statutory authority or jurisdiction of the administrative law judge; or
  3. Made upon unlawful procedures; or
  4. Affected by other error of law; or
  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 § 23-5-12(b)

- 2) 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)

- 3) In determining whether an injury resulted from a claimant's employment, a causal connection between the injury and employment must be shown to have existed.

Emmel v. State Comp. Dir., 150 W.Va. 277, 145 S.E. 2d 29 (1965)

- 4) The proof required to establish the compensability of a workers' compensation claim is sufficient evidence to make a reasonable person conclude that the injury occurred while performing the duties of employment.

Ramey v. S.C.C., 150 W. Va. 402, 146 S.E. 2d 479 (1966)

Machala v. S.C.C., 109 W. Va. 413, 155 S.E. 2d 169 (1930)

- 5) 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)

- 6) The Claims Administrator is required to provide reasonable and necessary treatment, health care, or healthcare goods and services.

West Virginia Code §23-4-3 and 85 CSR 20

- 7) 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)

- 8) Where, in the course of and arising out of his employment, an employee in good health and of strong physique, suffers physical injury which is followed by serious disability, competent physicians differing as to whether the disabilities are attributable to the injury, but 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)

## VI.

### ARGUMENT

John J. Delsignore was injured in the course of and resulting from his employment as a tree feller for Timberline Logging Enterprises, LLC (herein Timberline) on January 7, 2021, when a tree he cut down struck and broke a neighboring tree, which pitched a branch his direction. Mr. Delsignore stated that he attempted to get out of the way of the crashing branch,

but it nonetheless swung around and struck him, badly breaking his right ankle and injuring his lower back and left hip. Prior to this event, Mr. Delsignore was working full capacity without limitations or restrictions. His job duties included hiking deep into the woods while carrying heavy tree-felling equipment used in the regular course of his work for Timberline. Prior to his work injury, he performed these duties without restrictions or accommodations. After Mr. Delsignore was injured, he was treated by Dr. Dona Alvarez, Orthopedic Surgeon at Garrett County Regional Medical Center in Oakland, Maryland. Dr. Alvarez performed an ORIF on Mr. Delsignore's right ankle on January 7, 2021, because this injury was the most time-sensitive and needed to be addressed immediately. However, Dr. Alvarez directly stated that Mr. Delsignore voiced complaints of low back pain and hip pain from the time he initially received treatment on January 7, 2021. Later, after being left untreated, his back pain continued and his hip pain extended down into his left leg.

#### Right Ankle Subtalar Joint Arthritis

On September 27, 2021, Dr. Alvarez treated Mr. Delsignore in follow up and based upon her personal evaluation of Mr. Delsignore, her clinical impression was that he demonstrated post-traumatic arthritis in his right ankle. She recommended a custom orthotic and a "Richie Style" brace to address his right ankle pain and instability resulting therefrom. In Dr. Christopher Martin's December 1, 2021 "Claimant Medical Re-Evaluation" report, he agreed with Dr. Alvarez's recommendations, stating, "I concur with the medical necessity of the brace and the orthotics as treating the injured body part. When these devices wear out, they will require replacement." Taking Dr. Martin's concurrence with Dr. Alvarez's opinion, and combining that with his statements in his initial IME of July 20, 2021, in which he stated that Mr. Delsignore was at increased risk of developing post-traumatic arthritis and that it should be regarded as a

consequence of his compensable injury, it is more likely than not that Dr. Martin has acknowledged that Mr. Delsignore's ongoing symptoms and limitations are a result of his compensable work injury. Dr. Alvarez specifically stated her recommendation was for the purpose of addressing post-traumatic arthritis, and Dr. Martin has agreed with this recommended treatment. This demonstrates that Dr. Alvarez's clinical diagnosis was the appropriate course of action in order for Mr. Delsignore to receive necessary treatment. Lastly, though Dr. Martin had previously disagreed with Dr. Alvarez's diagnosis of post-traumatic osteoarthritis, he made no diagnoses contrary to this finding to explain Mr. Delsignore's symptoms.

Where, in the course of and arising out of his employment, an employee in good health and of strong physique, suffers physical injury which is followed by serious disability, competent physicians differing as to whether the disabilities are attributable to the injury, but 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, Dr. Alvarez has made a clinical diagnosis that is the only medical diagnosis offered to explain Mr. Delsignore's continued ankle limitations. She stated that she was making a clinical diagnosis, which was based upon her advanced knowledge from having performed his ORIF surgery, repeatedly treating him in follow up care, and personally witnessing his response to the surgical procedure. Further, Dr. Martin specifically stated that Mr. Delsignore was at increased risk of this condition due to his compensable injury, but provided no alternative diagnosis to otherwise explain his continued symptoms. Therefore, Pripich clearly dictates that it is to be presumed that this condition is to be attributed to his occupational injury of January 7, 2021, and the Intermediate Court of Appeals was clearly wrong to affirm the Board of Review's December 2, 2022 affirmation of the Claims Administrator's June 3, 2022 rejection of Dr. Alvarez's

Diagnosis Update Request, and as a result should be reversed and the diagnosis of right ankle subtalar joint arthritis should be ordered as compensable in this claim.

Left Hip Joint Pain, and Low Back Pain with Left Side Sciatica

On February 4, 2021, the Claims Administrator issued an Order holding Mr. Delsignore's claim compensable for the conditions of Displaced Trimalleolar Fracture of the Right Lower Leg, and Contusions of the Lower Back and Pelvis. "In determining whether an injury resulted from a claimant's employment, a causal connection between the injury and employment must be shown to have existed." Emmel v. State Comp. Dir., 150 W.Va. 277, 145 S.E. 2d 29 (1965). Here, the causal connection was apparent to the Claims Administrator, who held these conditions compensable. On its face, this Order acknowledged that Mr. Delsignore's lower back and hip were known injuries in his claim at his time of filing. However, these injuries continued to manifest and remain symptomatic due to the Claims Administrator's denial of treatment authorizations. "The Claims Administrator is required to provide reasonable and necessary treatment, health care, or healthcare goods and services." West Virginia Code §23-4-3 and 85 CSR 20. Mr. Delsignore testified that he initially received physical therapy for his ankle, hip, and back, but that the treatment for his hip and back were terminated when his physical therapists were "told not to do his hip and back anymore." Therefore, his hip and back injuries obviously did not resolve after the cessation of treatment.

Though Mr. Delsignore's lower back was examined by x-ray and determined not to show a fracture, Dr. Alvarez testified that these images were not reviewed for other issues beyond checking for fractures. Due to the consistency with which Mr. Delsignore continued to experience difficulty walking, and ongoing back pain and hip pain, Dr. Alvarez diagnosed right ankle subtalar joint arthritis, low back pain with left side sciatica, and left hip joint pain, and

requested that these conditions be added as compensable conditions within Mr. Delsignore's claim. However, in Dr. Martin's July 20, 2021 IME, he opined that Mr. Delsignore's medical record had "no reference to any other affected body part other than the right ankle." This is verifiably wrong by reference to a variety of evidentiary sources within the record, such as the Claims Administrator's February 4, 2021 Compensability Order holding his claim compensable for both his ankle injury and for "Contusion of the Lower Back and Pelvis", as well as the requested Diagnosis Update and Dr. Alvarez's deposition testimony in which she stated that he had continuous complaints of back and hip pain resulting from his work injury. Dr. Martin opined that Mr. Delsignore injured his hip and back at some point subsequent to his work injury, citing a physical therapy note from May 18, 2021, which noted, "left hip is more bothersome this morning than it has been with muscle tightness up into the low back" noting that he had "overdid it this weekend." However, by stating that his hip and back were "more bothersome [. . .] than it had been", this note instantly demonstrates that Mr. Delsignore's hip and back had been a known active issue prior to May 18, 2021. Had an intervening event occurred, the note would have presumably stated that Mr. Delsignore had injured his back over the weekend and presented with "new complaints" of back and hip pain.

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 them-selves 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. Delsignore has testified that he had never had pain associated with his left hip, pelvis, or lumbar spine prior to his January 7, 2021 work injury. Since the time of that injury, he has consistently suffered from right ankle pain, left



hip pain, and lower back pain such that he has been unable to return to work due to his ongoing symptoms and impaired walking ability. The causal relationship between this injury and his symptoms is clear, by virtue of the fact that both Dr. Alvarez and Dr. Martin feel that Mr. Delsignore will not be able to return to his former employment due to the lasting effects of having been struck so violently by the falling tree branch. Here, Moore states that the presumption must be that Mr. Delsignore's constant, debilitating ankle, hip, and back pain are the result of his compensable injury. Therefore, these conditions must be brought into his claim as compensable conditions, as they manifested following his January 7, 2021 work injury and have continued to be symptomatic since that injury.

Dr. Alvarez has testified that, "it has always been my belief [that Mr. Delsignore needed x-rays of his left pelvis, hip, and lumbar spine directly related to the injury of January 7, 2021]." She was of the strong opinion that his lower back and left hip condition were the result of his occupational injury in which he was struck by a tree limb with sufficient force to both break and dislocate his ankle and to cause severe contusions over his back and hip. Prior to his work injury, he did not have any of these symptoms. "The proof required to establish the compensability of a workers' compensation claim is sufficient evidence to make a reasonable person conclude that the injury occurred while performing the duties of employment." Ramey v. S.C.C., 150 W. Va. 402, 146 S.E. 2d 479 (1966), Machala v. S.C.C., 109 W. Va. 413, 155 S.E. 2d 169 (1930). Here, the severity of Mr. Delsignore's injuries resulting from being struck by the falling tree limb—including a displaced fracture and dislocation of his right ankle in addition to severe contusions to his hip and lower back—followed by new disabilities of ongoing pain in all of these same body parts and difficulty and/or inability to walk on uneven ground would lead any reasonable person to conclude that his injuries resulted from the effects of his occupational injury.

Dr. Alvarez has made a clinical diagnosis of subtalar arthritis in Mr. Delsignore's right ankle based upon his continued post-injury and post-operative limitations. She has recommended treatment to address this, and Dr. Martin has agreed with her recommendation, stating that Mr. Delsignore is at a higher risk of developing arthritis as a result of his injury. Therefore, a reasonable person would conclude that Mr. Delsignore has subtalar arthritis which is the result of his compensable injury. For these reasons, these conditions should have been held compensable within his claim.

The Board of Review shall reverse, vacate or modify the order or decision of the administrative law judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge's findings are:

1. In violation of statutory provisions; or
2. In excess of the statutory authority or jurisdiction of the administrative law judge; or
3. Made upon unlawful procedures; or
4. Affected by other error of law; or
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 § 23-5-12(b). The Board of Review failed its duty to reverse a clearly wrong order of the Claims Administrator.

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) Here, the Intermediate Court of Appeals has failed to correct the Board’s clearly wrong Order affirming the Claims Administrator’s clearly wrong rejection of Dr. Alvarez’s Diagnosis Update. This rejection has precluded Mr. Delsignore from receiving necessary treatment so that he may have an opportunity to recover from the injuries he sustained on January 7, 2021. For nearly two years, he has continued to be limited by pain in his right ankle, left hip, and lower back—issues he did not have prior to his work injury—as these conditions were excluded from his claim. “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). Here, the evidence demonstrates that Mr. Delsignore had no issues prior to his work injury, but has remained symptomatic and disabled from his work injury since that time due to ongoing pain and problems with his right ankle, left hip, and lower back and that Dr. Alvarez, his treating Orthopedic Surgeon and treating physician, has ascribed these conditions and limitations to his work injury of January 7, 2021.

## VII.

### PRAYER

WHEREFORE, your claimant and Petitioner, John J. Delsignore, respectfully prays that this Honorable Court will reverse the Decision of the Intermediate Court of Appeals of West Virginia dated September 5, 2023, which affirmed the Order of the Board of Review dated December 2, 2022, which affirmed the Claims Administrator’s order dated June 3, 2022, wrongly denying the request of Board Certified Orthopedic Surgeon Dr. Dona Alvarez to add right ankle subtalar joint arthritis, left hip joint pain, and low back pain with left side sciatica as

compensable conditions within his claim. Your claimant and Petitioner, John Delsignore, respectfully prays that this Honorable Court will issue an order directing that right ankle subtalar joint arthritis, left hip joint pain, and low back pain with left side sciatica be recognized as compensable conditions within his claim, as found by Dr. Alvarez through her consistent and repeated treatment of her patient, Mr. Delsignore, and for such other and further relief as appears proper in the circumstances.

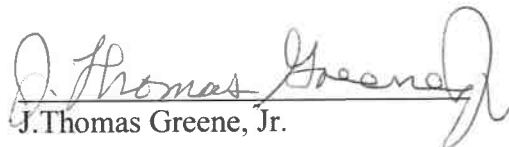
Respectfully submitted  
John J. Delsignore  
By Counsel



J. Thomas Greene, Jr. State Bar ID: 1477  
T. Colin Greene State Bar ID: 13314  
BAILEY, STULTZ & GREENE, P.L.L.C.  
P. O. Drawer 1310  
Weston, West Virginia 26452  
Counsel for Petitioner  
John J. Delsignore

#### CERTIFICATE OF SERVICE

I, J. Thomas Greene, Jr., counsel for the Petitioner, John Delsignore, do hereby certify that on this the 2nd day of November, 2023, a copy of the foregoing Petition for Appeal and Appendix of Relevant Documents were served upon Jeffrey M. Carder, Esq., Counsel for the Employer and Respondent, Timberline Logging Enterprises, LLC, by service via File&ServeXpress



J. Thomas Greene, Jr.

Counsel for Petitioner