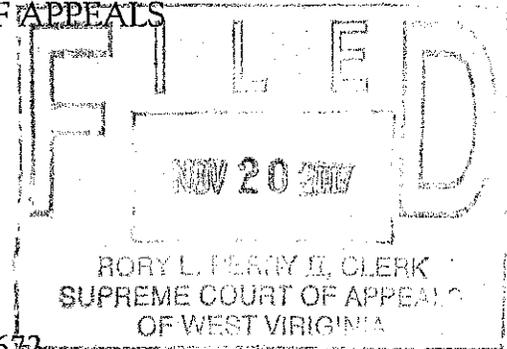


BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LLEWELLYN WILKINSON,

Appellant,



SC APPEAL NO.: 33672

WC BOARD OF REVIEW APPEAL NO. 74476

CLAIM NO.: 970054901

OOJ DECISION: 09/07/2005

WCC ORDER: 09/20/2004

v.

WORKERS' COMPENSATION OIG
and PUTNAM COUNTY BOARD OF EDUCATION,

Appellees,

BRIEF ON BEHALF OF THE APPELLANT
LLEWELLYN WILKINSON

Llewellyn Wilkinson,

By Counsel,

A handwritten signature in cursive script that reads "G. Patrick Jacobs". The signature is written in black ink and is positioned above the printed name and contact information.

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I. KIND OF PROCEEDING AND NATURE OF THE RULING
IN THE LOWER TRIBUNAL

This is a Workers' Compensation appeal on the issue of compensability of the Appellant's psychiatric condition. The Board of Review's Order of August 21, 2006 affirmed the Office of Judge's Order of September 7, 2005. The Office of Judges in turn affirmed the Commission's Order September 20, 2004, which denied the compensability of the Appellant's psychiatric condition.

II. STATEMENT OF FACTS OF THE CASE

1. The Appellant suffered a left ankle injury as a result of her employment on April 11, 1997. The Commission, by Order dated May 5, 1997, held the claim compensable.

The compensable components are:

845.0 Sprain/Strain of Ankle Unspecified

924.21 Contusion of Ankle

2. David L. Caraway, M.D. testified by deposition on March 7, 2005. Dr. Caraway is a Board Certified pain management specialist. Dr. Caraway Depo Tr. Pg. 5. Dr. Caraway testified and opined that Appellant's depression was a result and directly attributable to her April 11, 1997 work-related injury. Specifically, Dr. Caraway stated as follows:

"Q. Could you tell me the symptoms or complaints or diagnoses which led you to refer Llewellyn Wilkinson for a psychiatric consult?"

A. Well, there are a number of different entries into the chart. I'm looking right now at a note dated December 10, 2003, which may have been the genesis of the request for psychological complaints.

At that time, I felt she was maximally medically improved with regards to her pain syndrome, but that she was having ongoing significant depression as becoming overwhelming for her.

In fact, this goes back to prior to this date, because in this note I state, and I'm quoting, "We have tried to get her in to be evaluated at Oasis for one of the treatment programs, but it has been denied." So it had already been denied as of December 10, 2003.

I felt that her situation was so severe that it was really overwhelming for her; that she had had no previous history of this prior to her injury, and again my quote here is, "Most of her depression seems to state from her lack of ability to perform her previous activities; therefore, this is a work-related injury."

However, even prior to this she had been started on antidepressants to see if we could get her depressant symptoms under control which included findings such as anhedonia, which is a feeling of worthlessness; difficulty sleeping, and just a feeling of again, worthlessness and sadness.

More, recently she had has suicidal thoughts." Dr. Caraway Depo. Tr.

Pgs. 6-8.

“Q. Doctor, do you have a copy of the diagnosis update form that was submitted by William Webb, Ph.D., dated 9-1-04?

A. I do.

Q. Is there anything written in that that you disagree with?

A. No.

Q. Do you agree with the doctor’s request that her diagnosis include major depression and pain disorder?

A. Yes.” Dr. Caraway Depo. Tr. Pg. 11.

3. William B. Webb, Ph.D., testified by deposition on March 16, 2005. Dr. Webb is a licensed independent clinical social worker and also has a Ph.D. in psychology. Dr. Webb Depo. Tr. Pg. 4. Dr. Webb first evaluated the Appellant on March 11, 2004. Dr. Webb Depo. Tr. Pg. 5. Dr. Webb’s initial diagnosis was that the Appellant suffered from major depression, moderate to severe symptoms, and then chronic pain which was due to the injury. Dr. Webb Depo. Tr. Pg. 7. Dr. Webb opined that Appellant’s depression was a result of and due to the work-related injury she sustained on April 11, 1997. Specifically, Dr. Webb stated as follows:

“Q. Were you able to at that time conclude whether or not you felt that her depression was related to – as a compensable component or had a – whether it was a psychological overlay in the injury that she sustained on 4/11/97?

A. Given that she had no history that I know of prior to this of having depression, the sequence of events would in my mind and the history I was given have been precipitated by that injury.” Dr. Webb Depo. Tr. Pg. 7.

...

“Q. And in summary, do you – is it of your opinion that the diagnoses that you have reached, the major depression single episode secondary to chronic pain of work-related injury and pain disorder are caused by work-related injury?

Do you find that to be related to the injury she initially sustained on 4/11/97?

A. Yes. According to the information I have at hand, they are both secondary or were precipitated by that injury.” Dr. Webb Depo. Tr. Pg. 16.

4. The Appellant testified by deposition dated March 16, 2005. The Appellant testified that due to this injury of April 11, 1997, that she had had to have hernia surgery and surgery to put in a pain management stimulator. Appellant Depo. Tr. Pg. 5. The Appellant testified that she had never been treated for depression or depression symptoms prior to April 11, 1997. Appellant Depo. Tr. Pgs. 7-9. The Appellant testified that since April 11, 1997, she had developed feelings of hopelessness and helplessness, lack of energy, feeling of fatigue, and feelings of sadness. Appellant Depo. Tr. Pgs. 8-9, 10. The Appellant testified that she sits around and from time to time had crying spells. Appellant Depo. Tr. Pgs. 8-9. The Appellant testified that she attributed her depression and depression feelings to the April 11, 1997 injury. Specifically, she stated as follows:

“Q. So in your opinion do you attribute all of your depression and sadness and loss of energy and feeling of fatigue and helplessness and hopelessness to the – result of the injury of 4/11/97?

A. Yes, I definitely do because I was never -- you know I was never like that. I was always so active in everything and involved in everything. My kids are older, but they're involved now in cheerleading and baseball and all this and they'll -- you know, they'll say, Mom, can you help and I can't do it. I can't help them, you know -- they -- like, work in the concession stand maybe or something -- I can't stand on my feet that long or -- if I'm standing very long, then I have to sit down. Then I have to get up because it's just -- I cannot stand very long on that leg at all.” Appellant Depo. Tr. Pg. 10.

III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL

A. Whether the Workers Compensation Commission erred in refusing to add a psychiatric component to Appellant's claim.

B. The Board of Review's Order of August 21, 2006 upheld the Office of Judge's Order of September 7, 2005 which affirmed the Commission Order of September 20, 2004 denying the compensability of the Appellant's psychiatric condition.

IV. POINTS OF AUTHORITY RELIED UPON,
A DISCUSSION OF LAW AND THE RELIEF PRAYED FOR

W.Va. Code, § 23-4-1 provides for benefits to employees who receive an injury in the course of and as a result of their covered employment. Three elements must co-exist in compensability cases: (1) a personal injury, (2) received in the course of employment, and (3) resulting from that employment. Barnett v. State Workmen's Compensation Commissioner, 153 W.Va. 796, 172 S.E.2d 698 (1970); Jordan v. State Workmen's Compensation Commissioner, 156 W.Va. 159, 191 S.E.2d 497 (1972).

If the evidence, though slight, is sufficient to make a reasonable person conclude that the claimant was injured while performing his duties in the course of his employment or duties incidental to his employment, then the claim will be held compensable. This minimal burden can usually be satisfied by a claimant's testimony, and medical evidence of causation is not always required. Ramey v. State Workmen's Compensation Commissioner, 150 W.Va. 402, 146 S.E.2d 579 (1966); Pennington v. State Workmen's Compensation Commissioner, 145 W.Va. 378, 175 S.E.2d 440 (1970).

W. Va. Code, § 23-5-12(b) (2003).

Pursuant to W.Va. Code, §23-4-1g(a)(2003), for all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall

include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. 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.

It is fundamental that an award of benefits cannot be made in a Workmen's Compensation case unless the claim is supported by satisfactory proof that the Appellant sustained an injury during the course of and resulting from his employment. Emmel v. State Compensation Director, et al., W.Va. 145 S.E.2d 29, pt. 1 syl.; Deverick v. State Compensation Director, et al., W.Va. 144 S.E.2d 498, pt. 2 syl.; Hayes v. State Compensation Director, 149 W.Va. 220, pt. 3 syl., 140 S.E. 2d 443. "Whether an injury occurs in the course of and resulting from the employment so as to be compensable under the workmen's compensation act depends upon the particular facts in each case." Emmel v. State Compensation Director, et al., W.Va. 145 S.E.2d 29, pt. 2 syl.

Concerning the degree of proof required to establish a workmen's compensation claim the Court, in Machala v. State Compensation Commissioner, 109 W. Va. 413, 416, 155 S.E. 169, 170, stated: "The applicant, in this sort of proceeding, as in others, has the burden of proving his claim. But evidence sufficient to make a reasonable person conclude that the

decedent was injured while performing his duties in the course of his employment is sufficient. 2 Schneider on Comp. § 537. So the burden of proof rests upon the applicant to furnish evidence from which it can be logically drawn that the injury arose out of and in due course of the employment, but that such proof may be hearsay as well as direct. No rule may be laid down as to the degree of proof which is sufficient to justify such recovery. If the evidence, though slight, is sufficient to make a reasonable person conclude that decedent was injured while performing his duties in the course of his employment or duties incidental to that employment, then that feature of the case is proved." To the same effect see Eady v. State Compensation Commissioner, et al., 148 W.Va. 5, 10, 132 S.E.2d 642, 646.

The Appellant has introduced reliable, credible and uncontradicted evidence concerning the following facts:

1. The Appellant suffered a work related injury on 04/11/1997. Prior to Appellant's 04/11/1997 work-related injury, Appellant had never suffered depression or any other psychiatric problems. Appellant's Depo. Tr. Pgs. 7-9. Dr. Webb's Depo. Tr. Pg. 7.
2. Prior to the Appellant's work-related injury on 04/11/1997, the Appellant had worked between 13 and 15 years as a cook for the Putnam County Board of Education. Appellant's Depo. Tr. Pg. 4. Appellant had enjoyed an active and busy lifestyle prior to 04/11/1997. Appellant's Depo. Tr. Pg. 10.
3. The Appellant testified that she suffers from depression and that she has feelings of helplessness, hopelessness and worthlessness. The Appellant suffers from constant

and chronic pain which interrupts her sleep and causes her to be fatigued, tired, agitated and aggravated. All of the Appellant's psychological changes have occurred since 04/11/1997. Appellant's Depo. Tr. Pgs. 8, 9 & 10. The Appellant also has scar disfigurements around her waist which result in a large bulge. Appellant's Depo. Tr. Pg. 16.

4. Dr. Caraway and Dr. Webb have expressed their medical opinions that Appellant's psychological issues have a direct causal relationship to the 04/11/1997 work-related injury. Dr. Caraway Depo. Pg. 11 and Dr. Webb Depo. Pgs. 7 & 16. Dr. Webb and Dr. Caraway have requested that Appellant's compensable components include the psychiatric diagnoses of depression. Id.

5. The report of Dr. Ralph Smith, dated April 13, 2005, indicated that the Appellant did not have evidence of a major depressive disorder. Dr. Smith indicated that the Appellant had a pain disorder that could be attributable to the Appellant's injury.

6. There is no evidence to contradict Appellant's, William B. Webb, Ph.D. and David L. Caraway, M.D.'s sworn testimony.

In this case the Administrative Law Judge found that the Appellant "failed to submit evidence to establish that her psychiatric condition of a major depressive disorder and a pain disorder are causally connected to the claimant's injury of April 11, 1997." The Administrative Law Judge ignored all of the sworn testimony and evidence submitted by the Appellant and instead made a finding based upon speculation and conjecture that Appellant's depression is somehow related to her open heart surgery. The Administrative

Law Judge placed significant weight on an OMS review which stated that depression is a common symptom of open heart surgery. However, this is a general conclusion based upon a review by a source which did not personally examine or treat the Appellant. All of the Appellant's evidence is based upon treating sources and both Dr. Webb and Dr. Caraway had an ongoing treating relationship with the Appellant. In contrast, all of the evidence used by the Administrative Law Judge to make his findings of fact was based upon either a non-examining source (the OMS reviewers) or a non-treating source (Dr. Ralph Smith.)

Pursuant to W. Va. Code § 23-4-1g the Appellant has sufficiently met the burden required to establish that her claim should be held compensable.

The Administrative Law Judge has failed to make a correct, proper and accurate recitation of the facts related in this case. The Administrative Law Judge has also failed to properly, legally and correctly apply the law to the facts.

The Appellant has introduced reliable, credible and uncontradicted evidence. The Appellant's evidence consists of sworn testimony from two treating sources (Dr. Caraway and Dr. Webb). In addition, a one-time examining source, Dr. Smith, further supported Appellant's position that a psychiatric component should be added to Appellant's case.

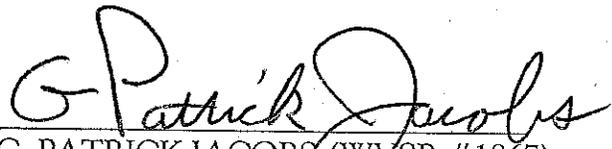
For all the reasons stated above, it is respectfully submitted that the Order of the Board of Review dated August 21, 2006 be reversed, that a psychiatric component should be added to Appellant's claim. Further, that the claim be remanded to the Commission/BrickStreet with instructions that the Appellant be authorized to receive

appropriate psychiatric treatment, temporary total disability benefits as substantiated by proper medical evidence and referral at the appropriate time for permanent partial disability rating. The Appellant has met her threshold burden of proof establishing compensable injury under any evidentiary standard, regardless of 2003, 2005 and 2006 amendments.

Respectfully submitted

Llewellyn Wilkinson,

By Counsel,

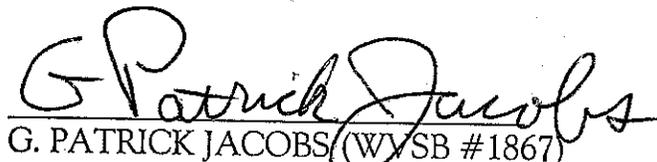

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CERTIFICATE OF SERVICE

I, G. Patrick Jacobs, counsel for the Appellant herein, do hereby certify that I have served a true and exact copy of the foregoing "APPELLANT'S BRIEF" by depositing same in the regular course of the United States Mail, postage paid this 19th day of November, 2007, to the following:

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