

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LLEWELLYN WILKINSON,

APPELLANT,

CLAIM NO.: 970054901

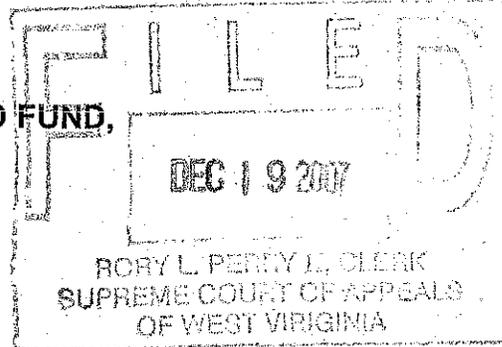
APPEAL NO.: 74476

V.

INSURANCE COMMISSIONER OF WV  
IN ITS CAPACITY AS ADMINISTRATOR OF THE OLD FUND,

AND

PUTNAM COUNTY BOARD OF EDUCATION,  
APPELLEES.



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APPELLEE'S BRIEF ON BEHALF  
OF  
THE INSURANCE COMMISSIONER

---

OFFICE OF THE INSURANCE  
COMMISSIONER OLD FUND,

By Counsel,

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December 19, 2007

The Honorable Rory L. Perry, II, Clerk  
West Virginia Supreme Court of Appeals  
Capitol Complex, Building 1, Room E-317  
1900 Kanawha Boulevard, East  
Charleston, WV 25305-0831

Re: - *Llewellyn Wilkinson v. Putnam County Board of Education.*  
WC Claim No. 970054901

Dear Mr. Perry:

Enclosed are the original and three copies of the *Appellee's Brief on Behalf of The Insurance Commissioner*. By copy of this correspondence, I am sending copies to the parties listed below.

Thank you for your consideration herein.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Anna L. Faulkner".

Anna L. Faulkner

WV State Bar No. 9480

ALF/kaw  
Enclosures

cc: G. Patrick Jacobs, Esquire  
Putnam County Board of Education, Employer

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APPELLEE'S BRIEF ON BEHALF OF  
THE OFFICE OF INSURANCE COMMISSIONER<sup>1</sup>

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I. PROCEDURAL HISTORY

This case comes to this Honorable Court on appeal from an Order of the Workers' Compensation Board of Review dated August 21, 2006. That Order affirmed the Decision of the Workers' Compensation Office of Judges dated

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<sup>1</sup> On December 31, 2005 at 11:59 p.m., pursuant to West Virginia Code §§ 23-2C *et. seq.*, and a proclamation of the Governor, the Workers' Compensation Commission was terminated. West Virginia Employers' Mutual Insurance Company, d/b/a BrickStreet Mutual Insurance Company, a private employer mutual insurance company, is now the sole provider of workers' compensation insurance in West Virginia for all claims with a date of injury of July 1, 2005 and thereafter. All earlier claims, such as the claim in issue here, remain a State of West Virginia obligation in what is statutorily referred to as the "Old Fund." The Old Fund is administered by the Insurance Commissioner. The Insurance Commissioner in its capacity as Administrator of the Old Fund is the real party-in-interest here. This pleading will refer to the Insurance Commissioner as Administrator of the Old Fund as the "Commissioner" when referring to events before and after January 1, 2006. The term "WCC" refers to the predecessor Workers' Compensation Commission and/or Division. This brief is that of the "Commissioner."

September 7, 2005. That Decision affirmed the Order of the former Workers Compensation Commission (hereinafter referred to as "WCC") dated September 20, 2004, which denied the addition of psychiatric conditions to this claim. The Board of Review's Order should be affirmed because no reversible error was committed.

## II. STATEMENT OF FACTS

The claimant herein worked in a school cafeteria and was injured on April 11, 1997 when frozen turkeys fell onto her foot. Her claim has been ruled compensable for sprain/strain of ankle and contusion of ankle.

The issue at hand arose when Dr. William Webb requested that major depression and pain disorder be added as compensable components of this claim. The former WCC denied that request by order dated September 20, 2004 based upon a review by the Office of Medical Management ("OMM") dated July 6, 2004.

The OMM review was written by Kathy Gue, RN and discussed with Dr. Kendall Wilson. They found insufficient justification to add a psychiatric component to this claim. They also noted that the claimant underwent open heart surgery the previous August and that depression is frequently associated with open heart surgery.

Previously, the former WCC denied authorization for treatment of the claimant's alleged psychiatric conditions on August 19, 2004. That order was not protested and is final.

The claimant was seen by Ralph Smith, M.D., a psychiatrist, at the request of counsel for the former WCC and he wrote a report dated May 5, 2005. The claimant also underwent a psychological evaluation administered by Stephanie Salisbury, B.A. which was interpreted by Teresa D. Smith, Ph.D., Licensed Psychologist, and that report is dated April 13, 2005. On the evaluations, the personality assessment inventory obtained invalid results and therefore could not be analysis. Teresa Smith's conclusions were that:

The results of the WAIS-III showed Mrs. Wilkinson's intellectual functioning to be in the borderline range. This performance appears to accurately represent intellectual potential. She appears to have functioning consistent with educational attainment. Academic achievement is commensurate with intelligence. She is currently showing a moderate amount of emotional distress. Anxiety was mildly present in test results. Depression was moderately present in the test protocol. Somatization is mildly present. She is realistic in self-concept. Her usual response to problems, conflicts, or stress is adaptive and useful. Psychological insight is acceptable.

Dr. Ralph Smith concluded that the claimant did not have major depression. "She has no major depression in my opinion. The affective component of her chronic pain syndrome is related to her compensable injury, in my opinion, through the chronic pain she experiences." He made an Axis I diagnosis of Chronic pain syndrome with psychological and physical factors, an Axis II diagnosis of undetermined, an Axis III diagnosis of Arteriosclerotic heart disease status post open-heart surgery, hypothyroidism, hypertension, and hypercholesterolemia. He found under Axis IV No other psychosocial stressors, and under Axis V the GAF is undetermined.

The record contains records from William Webb, Ph.D. and also his deposition dated March 16, 2005. He testified about the symptoms with which the claimant presented and he diagnosed her with major depression. He testified that, given the absence of a history of depression, the compensable injury was the cause of the claimant's major depression.

There are also records and a deposition by Dr. David Caraway, who is a pain management specialist. Dr. Caraway testified that the claimant suffered from depression and that the claimant's depression began approximately mid 2003.

The Administrative Law Judge affirmed the denial of the addition of psychiatric conditions. The September 7, 2005 decision, authored by Judge Henry R.C. Armstrong, notes the claimant's heart condition and open heart surgery which occurred in 2003. Judge Armstrong found fault with the opinions of Drs. Webb and Caraway because they failed to discuss that heart condition and surgery. Specifically, Judge Armstrong states on page 4 of his decision:

The OMS review indicated that depression is a common symptom of open heart surgery. There is no evidence in this claim to contradict that finding. Significant weight is placed upon the OMS review of the evidence, as well as the report of Dr. Smith who indicated that the claimant did not have a major depressive diagnosis. Although Dr. Smith indicated that there was an affective disorder due to the claimant's pain there was no discussion in the claimant's history that she had had open heart surgery. Therefore, the claimant has failed to eliminate an independent intervening cause in her development of her alleged depressive disorder and pain disorder. Without consideration of this Dr. Smith would have no basis to conclude whether or not the claimant's pain disorder was attributable to her injury.

No weight is placed upon the findings of Dr. Webb or Dr. Caraway and their conclusions that the claimant has a major depressive disorder, for this is clearly disputed in the report of Dr. Smith, who indicated that there is no major depressive disorder present in the claimant.

The ALJ continued, citing Wilson v. Workers' Compensation Commissioner, 174 W.Va. 61, 328 S.E.2d 485 (1984) which provides the rule that an independent intervening cause interrupts the causal connection to a compensable injury.

The Board of Review affirmed the Administrative Law Judge's decision, adopting his findings of fact and conclusions of law. This appeal ensued.

### III. ISSUE PRESENTED

Whether the Board of Review committed reversible error in its Order of August 21, 2006 in which it found that the claimant's alleged depression was not the result of the compensable injury.

### IV. ARGUMENT

The decision of the Workers' Compensation Board of Review should be affirmed because no reversible error was committed.

#### A. Standard of Review

W.Va. Code §23-5-15 sets forth the standard of review of an appeal before this Court.

(b) In reviewing a decision of 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 subsections (c) and (d) of this section.

(c) If the decision of the board represents an affirmation of a prior ruling by both the commission and the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the supreme court of appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record. If the court reverses or modifies a decision of the board pursuant to this subsection, it shall state with specificity the basis for the reversal or modification and the manner in which the decision of the board clearly violated constitutional or statutory provisions, resulted from erroneous conclusions of law, or was based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record.

(d) 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.

W. Va. Code, § 23-5-15 (2003).

Subsection (c) above applies to the case at bar because both the Office of Judges and the Board of Review affirmed the former WCC's denial of psychiatric condition herein. Therefore, the Board of Review can only be reversed 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."

#### B. Argument

The Board of Review's decision is in conformity with the law and no evidence was misstated or mischaracterized. Therefore, the Board of Review should be affirmed. The evidence of record does not establish that the claimant's psychiatric conditions are related to her compensable injury. The claimant, therefore, did not meet her burden of proof and the Office of Judges and the Board of Review were correct to affirm the former WCC's denial of the addition of the requested conditions.

#### **1. THE CLAIMANT'S DEPRESSION WAS NOT CAUSED BY THE COMPENSABLE INJURY.**

In order to sustain a claim for compensability of a secondary condition, a claimant must prove that he or she has that condition and the condition is related to the claimant's injury which occurred in the course of and as the result of the claimant's employment. "[T]he commission shall disburse the workers' compensation fund to the employees of employers subject to this chapter who

have received personal injuries in the course of and resulting from their covered employment . . .” W. Va. Code § 23-4-1 (2003).

There are three elements which must be proved by the claimant in order for a claim to be held compensable. (1) There must be a personal injury, which (2) is received in the course of employment, and (3) resulted from that employment. Barnett v. State Workmen's Compensation Commissioner, 153 W.Va. 796, 172 S.E.2d 698 (1970). There must be a causal connection between the claimant's injury and the claimant's employment. Emmel v. State Compensation Director, 150 W.Va. 277, 145 S.E.2d 29 (1965). Deverick v. State Compensation Director, 150 W.Va. 145, 144 S.E.2d 498 (1965).

“A claimant in a workmen's compensation proceeding has the burden of proving his claim.” Staubs v. State Workmen's Compensation Commissioner, 153 W. Va. 337, 168 S.E.2d 730 (1969). Sowder v. State Workmen's Compensation Commissioner, 155 W.Va. 889, 189 S.E.2d 674 (1972). “Where proof offered by a claimant to establish his claim is based wholly on speculation, such proof is unsatisfactory and is inadequate to sustain the claim.” Clark v. State Workers' Compensation Commissioner, 155 W.Va. 726, 187 S.E.2d 213 (1972).

W.Va. Code §23-4-1g (2003) states:

(a) 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.

(b) Except as provided in subsection (a) of this section, a claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter or in determining the constitutionality of this chapter.

The preponderance of the evidence does not support the compensability of psychiatric conditions in this claim. As discussed by the Administrative Law Judge, there is an intervening cause which was not considered by Drs. Webb and Caraway as the trigger of the claimant's depression. An independent intervening event defeats a finding of compensability. This Court previously held:

If a worker's compensation claimant shows that he received an initial injury which arose out of an in the course of his employment, then every normal consequence that flows from the injury likewise arises out of the employment. If, however, a subsequent aggravation of the initial injury arises from an independent intervening cause not attributable to the claimant's customary activity in light of his condition, then such aggravation is not compensable.

Syl. Pt. 4, Wilson v. Workers Compensation Commissioner, 174 W.Va. 611, 328 S.E. 2d 485 (1984).

The record shows that the claimant underwent open heart surgery in August 2003, which is approximately the time that the claimant began manifesting symptoms of depression. The record also shows that depression is a common occurrence following such a procedure. The open heart surgery is an independent intervening event which is not a part of the claimant's customary activities and in no way attributable to the compensable injury. The record does not show that the claimant experienced symptoms of depression in the six years between the compensable injury and the open heart surgery.

Further, there is evidence that the claimant does not have major depression at all. Dr. Ralph Smith did not make a diagnosis of major depression when he examined the claimant in April of 2005. Dr. Smith's opinion is the only opinion in the record from a psychiatrist.

## **2. THE BOARD OF REVIEW PROPERLY EVALUATED THE ADMINISTRATIVE LAW JUDGE'S DECISION**

The Board of Review gave appropriate deference to the decision of the Administrative Law Judge. The findings and conclusions of the Administrative Law Judge are to be treated with deference by the Appeal Board. Conley v. Workers' Compensation Division, 199 W. Va. 196, 483 S.E.2d 542 (1997). In addition, the "clearly wrong" standard which is sometimes referred to as the "plainly wrong" standard of review set out in W. Va. Code § 23-5-12(b) is a

deferential one, which presumes an administrative tribunal's actions are valid as long as supported by substantial evidence. Syl. Pt. 3, In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996). Frymier-Halloran v. Paige, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995). Conley v. Workers' Compensation Division, 199 W. Va. 196, 483 S.E.2d 542 (1997). Rhodes supra.

Furthermore, determinations regarding credibility and reliability by an Administrative Law Judge were addressed by this Court in Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995) wherein this Court stated that as a general rule, "we uphold the factual determinations, a matter reserved exclusively for the trier of fact." Accordingly, this Court noted that deference should also be given to an Administrative Law Judge's credibility determinations and inferences drawn from the evidence, despite what the Court [or Board] may perceive as other, more reasonable conclusions, from the evidence. Id.

The Board of Review reviewed the decision of the Administrative Law Judge. It did not violate a law nor did it misstate or mischaracterize any fact. There was no error, reversible or otherwise, and the Board of Review should be affirmed.

V. CONCLUSION

The Commissioner prays that the Honorable Court affirm the Board of Review's order of August 21, 2006 because no reversible error was committed.

Respectfully submitted,  
INSURANCE COMMISSIONER OF WV  
IN ITS CAPACITY AS ADMINISTRATOR OF  
THE OLD FUND  
By Counsel,

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Anna L. Faulkner (WV Bar # 9480)

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CERTIFICATE OF SERVICE

I, Anna L. Faulkner, Legal Counsel to the Insurance Commissioner of WV in its capacity as Administrator of the Old Fund, do hereby certify that a copy of the foregoing "Appellee's Brief on Behalf of The Insurance Commissioner" was served upon the parties of record this 19<sup>th</sup> day of December 2007, to the following persons properly addressed as follows:

HAND DELIVERY

The Honorable Rory L. Perry, II, Clerk  
West Virginia Supreme Court of Appeals  
Capitol Complex, Building 1, Room E-317  
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Charleston, WV 25305-0831

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Anna L. Faulkner