

**DO NOT REMOVE  
FILE COPY**

**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA**

ERNIE BOWERS,

PETITIONER

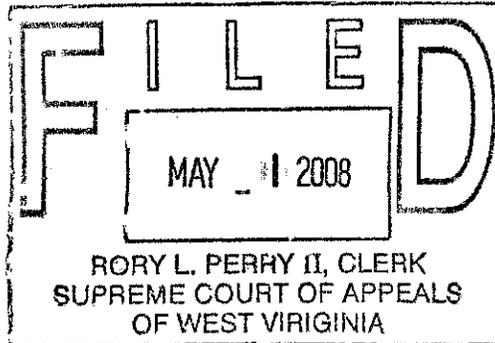
vs.

Claim No.2003012501  
D.O.I.: 07/12/2002

THE INSURANCE COMMISSIONER  
OF WEST VIRGINIA IN ITS CAPACITY  
AS ADMINISTRATOR OF THE OLD FUND,  
and  
LIGHTNING CONTRACT SERVICES, INC., Employer

RESPONDENTS,

PETITION FOR APPEAL ON BEHALF  
OF THE CLAIMANT/PETITIONER,  
ERNIE BOWERS



Submitted by:

LINDA GARRETT  
State Bar No. 2716  
Linda Nelson Garrett, P.L.L.C.  
P. O. Box 909  
Summersville, West Virginia 26651

April 29, 2008

ERNIE BOWERS,

PETITIONER,

vs.

Claim No.2003012501  
D.O.I.: 07/12/2002

THE INSURANCE COMMISSIONER  
OF WEST VIRGINIA IN ITS CAPACITY  
AS ADMINISTRATOR OF THE OLD FUND,  
and  
LIGHTNING CONTRACT SERVICES, INC., Employer

RESPONDENTS,

PETITION FOR APPEAL ON BEHALF  
OF THE CLAIMANT/PETITIONER,  
ERNIE BOWERS

KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

This is a workers' compensation claim where the claimant suffers from depression following a severe injury. The claimant's treating physician requested that depression be added as a compensable condition of this claim. The claim administrator, Office of Judges and Board of Review denied adding this condition for the reason that the claimant's evidence did not meet the Guidelines of Title 85-20-12.2a which state that in order to be regarded as work related, symptoms of an injury related psychiatric diagnosis must be manifest within six months of injury or significant injury related complication based on credible medical evidence. The claimant asserts that his depression is directly related to his "failed back surgery".

This is the claimant's appeal from the Office of Judges' decision dated February 5, 2007. This decision affirmed the Claim Administrator's Order of October 3, 2006, which corrected an Order dated July 28, 2006, denying the addition of the Diagnosis Code 311

Major Depression as part of the compensable injury, and denied the addition of Diagnosis Code 311 Major Depression as part of the compensable injury per Office of Medical Management Review dated July 11, 2006, and Title 85-20-12.2a. The same decision reversed a prior addition of a diagnosis code for the claimant's knee, which the claimant does not appeal.

### **STATEMENT OF FACTS**

The claimant is a 57 year old former mechanic in a coal mine who injured his lower back and neck when he was using a bar to lift a heavy motor when he slipped, falling backwards and injuring his lower back and neck. In January of 2003 the claimant underwent an anterior cervical microdiscectomy with fusion at the C6-7 level by Dr. Julian Bailes at WVU. An MRI of the claimant's lumbar spine was performed on May 5, 2003 and revealed a small disc herniation at the L4-5 level to the left and degenerative disc disease.

The claimant was treated with pain management by Dr. Richard Vaglianti and referred to Dr. Joseph Fernandez for a permanent impairment rating.

The claimant submitted the following evidence to support addition of the diagnosis of depression:

1. Dr. Richard Trenbath, in his office note dated April 27, 2004, states: "On exam he has a very depressed affect." Dr. Trenbath states he gave Mr. Bowers some coupons for Paxil CR 12.5 for 14 days then go up to CR 25 for 14 days and that he thinks this will make Mr. Bowers a lot better.
2. Dr. Richard Trenbath, in his office note dated May 25, 2004 recommends Mr. Bowers continue the Hydrocodone and Paxil CR 25 mg..

3. Dr. Richard Trenbath, in his letter to Workers' Compensation dated May 26, 2004, requests authorization for Paxil CR 25 mg. for depression that has developed because of the injury.
4. Dr. Alex Ambroz evaluated Mr. Bowers at the request of the Commission on October 29, 2004. Dr. Ambroz states, on page 3 of his report, "He does complain of depression, frustration, anger and confusion. Pain killers give him very little relief of the pain. He cannot walk more than 1/4 mile."
5. Dr. Richard Trenbath, in his Office Note dated May 19, 2006, states: "Although I haven't mentioned in the notes, there is no question that Ernie Bowers is extremely depressed. He is very blue, sad, melancholy. He is inactive. He doesn't do any projects that he would like to do any more. He only eats a small meal a day, in other The words his appetite is decreased. His sleep is very poor, he can hardly sleep at all. So depression is a strong part of this disease that he has."
6. Dr. Richard Trenbath completed a Diagnosis Update Form on May 24, 2006 requesting 311 Major Depression be added as a compensable diagnosis. Dr. Trenbath states: "This patient has a neck and low back injury, but because of this, he is not able to do anything that he would like to do. Therefore, he has developed major depression. He eats only one meal a day. He doesn't sleep very much. He has lost interest in doing anything very much anymore. On exam, he has a flat affect. He is sad, melancholy, and very depressed."
7. Dr. Richard Trenbath, in his Office Note dated July 13, 2006, states: "He is still taking Prozac. It is helping a little bit. We'll go up from 20 mg to 40mg q.d. #30-2 refills."
8. Dr. Richard Trenbath's testimony was taken by telephone deposition on November 21, 2006.

On page 8 of the transcript, Dr. Trenbath is questioned concerning Mr. Bowers' depression:

Q: "Dr. Trenbath, is it your opinion that the Claimant's depression, which you had diagnosed and were treating him for with medication, was a direct result of his compensable injury?"

A: "Yes."

On pages 12 and 13 of the transcript, Dr. Trenbath is further questioned concerning Mr. Bowers' depression:

A: "The main problem is that he's not gotten better. He still has chronic pain in various points, and he's still not able to really do very much, and that's why he's so depressed. I mean, it's hard for him just to carry out his various tasks of driving and walking and doing things around the house."

- Q: "Has his depression, as reported by him, affected his appetite and his sleep?"
- A: "Yes, yes. I did actually document that in that note. Right. He's not eating well, and he's not sleeping well. At least, that's what he claims."
- Q: "Would those be classic signs of a more severe depression?"
- A: "Yes, classic signs."
- Q: "Did the Claimant continue on the anti-depressant during the course of your treatment?"
- A: "Yes. I think he was given Prozac, which is relatively inexpensive. I suppose he was buying that himself. We did not have any samples of that. So, yes, he was continued as much as possible on the medicine."
- Q: "Is it your opinion that Mr. Bowers requires and needs medication for his depression to help alleviate that?"
- A: "Yes, and that will help him with his pain a little bit to that extent, too."
- Q: "And, do you have an opinion as to whether this is a permanent condition that Mr. Bowers will suffer from as long as he continues to suffer from the chronic pain?"
- A: "I believe so. That's, of course, somewhat of a minor controversial issue. But people that have recurrent episodes of depression are normally held to require medication lifelong. So it is a permanent condition, especially since he continues to be plagued by his chronic pain and disability."

Dr. Trenbath is further questioned concerning Mr. Bowers' depression on pages 20 and 21 of the transcript:

- Q: "Based on all of your examinations and treatment of Mr. Bowers from August of 2002 through the last time you saw him, which my notes indicate was October 4, 2006 -- you may have seen him since then, but it's not on that note -- has Mr. Bowers' back condition, both with regard to his neck, but more particularly with regard to his low back, progressed?"
- A: "I think that it has, yes."
- Q: "And as a direct result of his compensable injury, it's your opinion to a reasonable degree of medical probability that he suffers from major depression?"
- A: "That's correct."
- Q: "And, is it also your medical opinion to a reasonable degree of medical probability that his right knee should be added as a compensable condition as well as the major depression?"
- A: "O, yes, yes. These are generally related to his injury, especially the depression. And the knee, also, he wouldn't have hurt it if he hadn't had the injury."

Despite the medical records contained in Mr. Bowers workers' compensation file and the testimony of Dr. Richard Trenbath, Mr. Bowers' treating physician, the Office of Judges, contrary to the reliable, probative evidence, relied upon the arbitrary and capricious rule embodied in Title 85-20-12.2a, which states that, in order to be regarded as work related, symptoms of an injury related psychiatric diagnosis must be manifest within six months or injury or significant injury related complication based on credible medical evidence. The Office of Judges found that the evidence presented by the claimant did not meet the standard. The claimant requests that diagnosis code 311 Major Depression be added as compensable condition of this claim.

**ASSIGNMENT OF ERROR RELIED UPON IN APPEAL  
AND MANNER IN WHICH IT WAS DECIDED IN LOWER TRIBUNAL**

1. The Claim Administrator, by Order dated October 3, 2006, denied a request to add Diagnosis Code 311 Major Depression as part of the compensable injury per Office of Medical Management Review dated July 11, 2006, and Title 85-20-12.2a.
2. The Office of Judges, by Decision dated February 5, 2007, affirmed the Order of October 3, 2006.
3. The Board of Review, by Order dated March 26, 2008, affirmed the decision of the Office of Judges.

The claimant asserts that denial of the addition of depression as a compensable condition of this claim denies the claimant treatment for a condition directly related to his compensable injury, as authorized by W.Va. Code 23-4-1 et seq..

## POINTS AND AUTHORITIES RELIED UPON

1. An affliction with a disease not related to the workplace is no bar to compensation where injury at the workplace aggravates or accelerates the disease. It is no answer to say the disease alone might some day have caused the disability anyway. *Charlton vs. State Workmen's Compensation Commissioner*, 236 S.E.2d 241 (W.Va., 1977.)
  
2. A diseased workman who in the course of and resulting from his employment receives an injury, which aggravates or accelerates the disease, to the extent of causing a disability sooner than would otherwise have occurred, is entitled to compensation from the Workers' Compensation Fund. *Gallardo vs. Workers' Compensation Commissioner*, 373 S.E.2d 177 (W.Va. 1988).
  
3. A preexisting infirmity of an employee does not disqualify him from prosecuting a successful claim for compensation based upon a new injury arising from his employment... the employer must take the employee as he finds him. *Jordan v. State Workmen's Comp. Comm'r*, 156 W. Va. 159, 191 S.E.2d 497 (1972).
  
4. 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.

5. West Virginia Code §23-4-3(a) states "The commission shall disburse and pay from the fund for personal injuries to the employees who are entitled to the benefits under this chapter as follows:

(1) Sums for the health care services, rehabilitation services, durable medical and other goods and other supplies and medically related items as may be reasonably required."

### **DISCUSSION OF THE LAW**

Working individuals who are injured in the course of and as a result of their employment in West Virginia are entitled to receive compensation for their injuries. This basic tenet of workers compensation law is embodied within West Virginia Code §23-4-3(a).

Contrary to the clear intent of the legislative act, the Rules promulgated pursuant thereto state that unless depression occurs within six months of an injury it is not compensable. In this case the claimant underwent surgical procedures and his condition worsened. It was only after a protracted period of time that the claimant manifested symptoms of depression as diagnosed by his treating physician.

It is of note that the evaluator for the Commissioner, Dr. Alex Ambroz, noted depression on October 29, 2004. However, that report of the Commissioner did not meet the standard to provide proof that the claimant's depression occurred within six months of the injury.

The claimant maintains that he has submitted proof of a very serious, debilitating injury which has rendered him unable to work at all. He is depressed as a direct result of his work injury and that depression is not permitted to be added as a diagnosis or be

treated because of an arbitrary rule designed only to save money on medical treatment, not to render needed treatment to injured workers. As such, the Rule is contrary to the statute. The claimant asserts that he has demonstrated reliable proof that his depression is compensable.

RELIEF PRAYED FOR

WHEREFORE, the claimant respectfully requests that this Honorable Court accept the Petition of the Claimant and grant the claimant's request to add depression as one of the compensable conditions of this claim.

Respectfully submitted this 29th day of April, 2008.



Linda Garrett

Counsel for the Claimant

Linda Garrett  
State Bar No. 2716  
Linda Nelson Garrett, PLLC  
704 Professional Park Drive  
P.O. Box 909  
Summersville, West Virginia 26651-0909

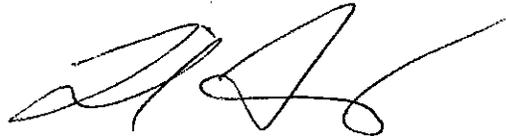
**CERTIFICATE OF SERVICE**

I, Linda Garrett Dyer, counsel for the Appellant, do hereby certify that I have this 29th day of April, 2008, served the foregoing Petition for Appeal on Behalf of the Claimant/Petitioner, upon the within named interested parties by mailing a true copy by regular U.S. Mail, postage prepaid and addressed, to-wit:

Cambridge Integrated Services  
P O Box 431  
Charleston, WV 25322

Workers' Compensation Commission  
Defense Division  
P O Box 4318  
Charleston, WV 25364-4318

Lightning Contract Services, Inc.  
P O Box 293  
Teays, WV 25569-0293



---

Linda Garrett  
Linda Nelson Garrett, P.L.L.C.  
Attorneys at Law  
704 Professional Park Drive  
P. O. Box 909  
Summersville, WV 26651-0909