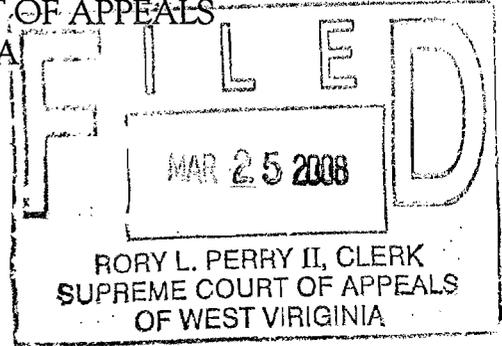


35219

BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MARTY L. GREATHOUSE,

Petitioner,



APPEAL NO.:
WC BOARD OF REVIEW APPEAL NO. 2037617
CLAIM NO.: 2004026955
OOJ DECISION: 03/29/2007
CLAIMS ADMIN. ORDER: 09/25/2006

v.

WV OFFICES OF THE INSURANCE COMMISSIONER
and THE WACKENHUT CORPORATION,

Respondents,

BRIEF ON BEHALF OF THE PETITIONER
MARTY L. GREATHOUSE

Marty L. Greathouse,

By Counsel,


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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 reopening the petitioners claim for Temporary Total Disability (TTD) benefits. The Board of Review's Order of 03-05-2008 found the petitioner was not entitled to reopen his case for TTD benefits. The Office of Judge's Order of 03-29-2007 ruled that the petitioner was entitled to reopen his claim and further awarded TTD benefits from 06-26-2006 to 10-01-2006. The Claims Administrator Order of 09-25-2006 denied petitioners reopening application.

II. STATEMENT OF FACTS OF THE CASE

1. The claimant, a security guard, sustained an injury to his left arm, neck and shoulder on December 17, 2003, while in the course of and as a result of his employment with The Wackenhut Corporation. The claim was held compensable for sprain/strain of the neck, mononeuritis of the upper limb and sprain/strain of the shoulder/arm by Claims Administrator's Order dated December 19, 2003. The claimant was evaluated by Dr. Michael Condaras on February 28, 2005, found to be a maximum medical improvement with a 6% whole-body medical impairment as a result of his compensable injury. The claimant was awarded a 6% permanent partial disability award by Claims Administrator's Order dated April 8, 2005 and the claim was closed.
2. The claimant filed a petition to reopen his claim on a TTD basis on

August 16, 2006. The petition included the opinion of Dr. Jeffrey L. Summers dated June 26, 2006, which indicates that the claimant was TTD from June 26, 2006 to October 1, 2006 due to an aggravation and neck pain and shoulder pain and left wrist pain associated with his compensable injury. The claimant indicated on his Reopening Application that he was receiving Social Security benefits. The Claims Administrator, by Order dated September 25, 2006, denied the request for a reopening on a TTD basis, indicated that the claimant had reached his maximum degree of medical improvement.

3. Dr. Summers testified on January 4, 2007 as to his care and treatment of the claimant regarding his compensable injury of December 17, 2003. Dr. Summers indicated that he believed that the claimant had suffered a progression or aggravation of his compensable condition after being evaluated by Dr. Condaras, and that he believed that the claimant was temporarily totally disabled from June 26, 2006 to October 1, 2006.
4. The claimant testified on January 4, 2007 as to the nature and events of his compensable injury and the care and treatment surroundings his compensable injury. The claimant indicated that he applied for Social Security Disability benefits because he had no income and could not return to work. The claimant testified that he believed that his condition got

worse after he was evaluated by Dr. Condaras. The claimant has a desire to return to the work force. The claimant testified that he was approved for Social Security Disability benefits and not retirement benefits that the claimant is only 41 years of age.

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

A. Whether the Board of Review erred in ruling that the Petitioner's claim should not be reopened since Petitioner was receiving Social Security Disability benefits and therefore Petitioner was not entitled to TTD benefits.

B. The Board of Review's Order of 03-05-2008 found that the Petitioner was not entitled to reopen his case for TTD benefits because he was receiving Social Security Disability benefits. The Office of Judge's Order of 03-29-2007 ruled that the Petitioner was entitled to reopen his claim and further awarded TTD benefits from 06-26-2006 to 10-01-2006. The Claims Administrator Order of 09-25-2006 denied Petitioner's reopening application.

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

1. For the purposes of obtaining a reopening of a Workers' Compensation claim, under the provisions of W.Va. Code, § 23-5-2 and 23-5-3, the Petitioner must make application in writing showing a progression or aggravation of the compensable condition or some other fact or facts which were not previously considered by the Division which would entitle the Petitioner to greater benefits than he/she already received.

2. As defined in Harper v. State Workmen's Compensation Commissioner, 160 W.VA. 364, 234 S.E.2d 779 (1977), "cause" for further adjustment of an award has been interpreted as a showing of a prima facie cause which means nothing more than any evidence which would tend to justify, but not compel, the inference that there has been a progression or aggravation of the former injury.

3. 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.

4. Temporary total disability is an inability to return to substantial gainful employment regarding skills or activities comparable to those of ones previous gainful employment during the healing or recovery period after injury. Allen v. S.W.C.C., 314 S.E.2d 401 (W.Va. 1984).

5. The applicable statute relating to closure of TTD benefits is W.Va. Code, 23-4-7a. in pertinent part, W.Va. Code, 23-4-7a(d) et. seq., provides as follows:

(d) When the commission... concludes that an independent medical evaluation is indicated, or that a claimant may be ready for disability evaluation in accordance with other provisions of this chapter, the commission... shall refer the claimant to a physician or physicians of its selection for examination and evaluation.

(e) Notwithstanding any provision in subsection (c) of this section, the commission... shall enter a notice suspending the payment of TTD benefits but providing a reasonable period of time during which the claimant may submit evidence justifying the continued payment of TTD benefits 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 commission... that the claimant has reached his or her maximum degree of improvement or that he or she is ready for disability evaluation and when the authorized treating physician has not made any recommendation with respect to a permanent disability award as provided in subsection © of this section;

(3) When other evidence submitted to the commission...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, including, but not limited to, physical activities inconsistent with his or her compensable workers' compensable injury.

An application or request for reopening and any subsequent award of further temporary total disability benefits is a two-step process. First, the claimant must provide sufficient evidence to justify a reopening of the claim. In this regard, Harper, supra, 234 S.E.2d at 783, and Wilson v. Workers' Compensation Commissioner, 174 W.Va. 61, 328 S.E.2d 485, 488 (1984), require the reopening application to demonstrate "new" facts in support of an aggravation or progression of the claimant's compensable condition or "new" facts not otherwise previously considered by the WCC. As the Harper Court stated: "[t]he purpose of the application is to acquaint the Commission with new changes in the claimant's condition or new facts which were not considered at the time the Commission made his former finding of disability." 234 S.E.2d at 783.

In this case, the Administrative Law Judge made a finding that a preponderance of the evidence supported that the Petitioner case should be reopened upon new facts showing an aggravation or progression of the injury or other facts not theretofore considered. Harper and Wilson.

W.Va.Code, § 23-4-1g provides that the resolution of any issue 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. **If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.**

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence must not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

The deposition of Jeffrey L. Summers, D.C., the Petitioner's treating physician was dated January 4, 2007 and submitted by the Petitioner. Dr. Summers is board certified by the American Board of Chiropractic Orthopedists, American Board of Independent Medical Examiners and is a fellow of the American Academy of Chiropractic Orthopedists. Specifically, Dr. Summers testified as follows:

"Q. All right. The key issue, Doctor, and what I want to ask you about is, Dr. Condaras did an evaluation on February 23, 2005, and his report is dated February 28, 2005, whereby he found the following impairments for this claim for Mary Greathouse.

The Cervical, he found five percent impairment; the left shoulder, one percent impairment; the left elbow, zero percent impairment.

And my question to you is, in the form you marked, on question number seven, on the reopening application. "Has there been an aggravation," you stated, "yes," and then, of course, "see report." I just wanted to know if you could testify concerning the basis for your finding that there had been an aggravation.

Of course, the key is an aggravation. His condition has to have gotten worse or become aggravated since he saw Dr. Condaras in February 2005.

A. Right. Based on the range of motion findings from Dr. Condaras' exam from mine, there was a decrease in the range of motion.

Q. What specific body part are you talking about?

A. I'm talking about the cervical spine.

Q. The neck?

A. Yes.

Q. Okay. And so, you did some range of motion testing pursuant to AMA Guidelines, 4th edition, and compared those to what Dr. Condaras found in February 2005?

A. That's correct.

Q. And you found that the range of motion for Marty Greathouse had decreased; is that correct?

A. That's correct.

Q. And that would be consistent with what his testimony has been. He's also testified that his range of motion has decreased.

Now, with regard to the range of motion testing for the neck, the cervical area, you tested bending forward and backward and left to right?

A. Yes, I did.

Q. What was that?

A. The chronic cervical strain/sprain and a chronic left shoulder strain/sprain.

Q. Did you feel that his condition had become worsened or become aggravated since being seen by Dr. Condaras on February 2005?

A. Yes, it appeared to be.” Dr. Summers deposition transcript pages 6-8

.....

“Q. Okay. Just in conclusion then, it’s your opinion, based upon a reasonable degree of medical and chiropractic certainly, that his medical condition which is related to his original injury at 12/17/03 related to his neck and his left shoulder has worsened.

No, you’re limited to the neck; is that correct?

A. Yes.

Q. And that is has worsened?

A. Yes.

Q. It has worsened since he was seen by and the findings were made by Dr. Condaras in February 2005; is that correct?

A. Yes. “Dr. Summer’s deposition transcript page 10.

.....

With regard to whether or not the Petitioner's medical condition had worsened, there is no evidence to contradict, challenge or dispute Dr. Summers' sworn testimony. Neither the Administrative Law Judge nor the insurance commission found any evidence to specifically and explicitly challenge the credibility of the Petitioner's treating physician's testimony, i.e. Dr. Summers' sworn testimony. Javins v. WCC, 173 W.Va. 747, 320 S.E.2d 119 (W.Va. 1984).

The over-whelming evidence and uncontradicted evidence in this case clearly establishes that the Petitioner's work-related medical condition had worsened and become aggravated and progressed. The Petitioner testified that his medical condition had become worse. Petitioner's Depo. Tr. Pgs 9-15. Dr. Summers' testimony also supports the Petitioner's testimony.

Both the Petitioner and Dr. Summers' testified that Petitioner's compensable component, sprain/strain of cervical neck, had worsened since Petitioner was examined by Dr. Condaras on February 23, 2005. On that date, Dr. Condaras found that the Petitioner had reached maximum medical improvement.

It is important to note that Dr. Summers' testimony reflects the testimony of a "treating source." Dr. Summers' has the advantage, as a treating source, of multiple face-to-face contact with the Petitioner, he also has available to him actual clinical observations. This is in contrast to an examining, one-time source who only sees the Petitioner one-time for a very limited amount of time or a medical record examination source who never

examines the Petitioner. In addition, Dr. Summers is board certified as an Independent Medical Examiner.

The Petitioner has introduced clear and uncontraverted evidence that the Claim's Administrator's decision was wrong. The decision making process used by the ALJ is correct pursuant W. Va. Code, § 23-5-12(b) (2003). The Petitioner presented evidence which consisted of the sworn testimony of the Petitioner and his treating physician, Dr. Summers'. The evidence presented by the Petitioner clearly proves by a preponderance of the evidence that the Petitioner's medical condition (sprain/strain cervical) had worsened and deteriorated and become aggravated. **The Petitioner's evidence is clear, uncontradicted and unambiguous.** W.Va.Code, § 23-4-1g, Harper, supra, 234 S.E.2d at 783.

Per W.Va.Code, § 23-4-1g "If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted." Applying the appropriate case law with the appropriate statute to the evidence clearly establishes that Petitioner has met the statutory and case law burden of proof to reopen his case and be awarded TTD benefits.

In this case all of the evidence supports Petitioner's position that his case should be reopened. There is no conflicting evidence to the contrary. The evidence is irrefutable and uncontradicted that Petitioner's reopening application should be granted.

The Board of Review, by Order dated 03-05-2008, ruled that the Petitioner was not

eligible for any wage replacement benefits because he was receiving Social Security Disability benefits during the relevant time period. Specifically the Board ruled as follows:

“The Board finds the final order’s analysis and conclusions were clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The evidence of record establishes that the claimant was not entitled to TTD benefits, which are wage replacement benefits. The evidence establishes that the claimant was receiving Social Security Disability benefits at the time he signed the Claim Re-opening Application in 2006. Consequently, he had no wages to replace. Therefore, this Board holds that the claimant is not entitled to TTD benefits for the time period from June 26, 2006 to October 1, 2006.”

The Board fails to site any case law, statute, logic or other acceptable reasoning to support the basis of their ruling. The ruling is in clear conflict with W.Va. Code 23-4-7a, the applicable statute relating to closure of TTD benefits. In contrast all of the Petitioner’s evidence supports the reopening of his case as found by the 03-29-2007 Office of Judge’s Decision. Additionally, Petitioner’s own testimony, by deposition taken 01-04-2007 clearly establishes that Petitioner sought Social Security Disability on a temporary basis until he could medically recover and return to work. (Petitioner’s depo transcript pages 8-9.)

For all the reasons stated above, it is respectfully submitted that the Order of the Board of Review dated March 5, 2008 be reversed and that the March 29, 2007 Office of Judge’s Order be reinstated

Respectfully submitted

Marty L. Greathouse,

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 contact information.

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CERTIFICATE OF SERVICE

I, G. Patrick Jacobs, counsel for the Petitioner herein, do hereby certify that I have served a true and exact copy of the foregoing "PETITIONER'S BRIEF" by depositing same in the regular course of the United States Mail, postage paid this 24TH day of March 2008, to the following:

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