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WEST VIRGINIA SUPREME COURT OF APPEALS

FILED
NOV - 7 2011

GEORGETTE A. MORTON,
Appellant,

v.

Claim No. 2010015856
Supreme Court No. 11-1382

SENECA HEALTH SERVICES, INC.,
Appellee.

Response

BRIEF ON BEHALF OF APPELLEE,
SENECA HEALTH SERVICES, INC.

Marion E. Ray *(WVSB #4693)*
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Post Office Box 1386
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November 7, 2011

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I. NATURE OF THE PROCEEDING

This claim comes before this Court pursuant to the claimant, Georgette A. Morton's, appeal from the ruling of the Workers' Compensation Board of Review dated September 14, 2011 (Exhibit A), which properly affirmed the decision of the Administrative Law Judge dated February 4, 2011 (Exhibit B). The Administrative Law Judge had properly affirmed the Claims Administrator's order dated September 15, 2010 (Exhibit C), rejecting the claim, as the record shows that the claimant's injury was not incurred in the course of and as a result of her employment with the current employer. Therefore, denying the compensability of this claim was proper.

II. STATEMENT OF THE FACTS

The claimant was employed as a clerical worker for the employer, Seneca Health Services, Inc., on September 1, 2010. Her specific duties were typing, formatting, editing, retrieving and copying data; contributing to the daily efficient operations by collecting information; scheduling and monitoring client appointments; collecting prior balances; facilitating communications by answering the telephone; processing data; securing information while adhering to HIPAA regulations; maintaining professional knowledge by participating in training opportunities.

On September 1, 2010, the claimant filed a claim stating she injured her right wrist, arm and shoulder that day while she was helping a co-worker lift a heavy box of maternity clothes that a coworker was moving to that coworker's car for her personal benefit (Exhibit D). Therein, the claimant states that as she was lifting up on the box of maternity clothes she lost her balance and fell injuring her right arm and back.

The employer filed a report of injury stating the claimant was helping another staff member lift a box full of maternity clothes when the injury occurred. The staff incident/injury report stated that the box the claimant was lifting was not the employer's property or related to her job duties. It is uncontested that the claimant was not asked or told by

any supervisor to remove the box of maternity clothes and that the coworker was not working at the time of the injury.

The evidence of record submitted for the expedited hearing was:

1. Correspondence from Dr. Joe M. Pack to counsel for the claimant dated January 3, 2010 (actually January 3, 2011) (Exhibit E).

2. A clinical note of Dr. P. Ryan dated September 1, 2010 (Exhibit F).

3. Staff incident/injury report dated September 1, 2010 (Exhibit D).

4. Radiology report dated September 1, 2010, interpreted by Dr. H. Rose (Exhibit G).

6. A clinical note of Dr. J. Pack dated September 7, 2010 (Exhibit H).

7. Authorization to return to work from Jackson River Orthopedics dated September 7, 2010 (Exhibit I).

8. Employee and Physician's Report of Injury dated September 7, 2010 (Exhibit J).

9. Authorization to return to work completed by Dr. J. Pack dated September 8, 2010 (Exhibit K).

10. Clinical note of Dr. J. Pack dated September 8, 2010 (Exhibit L).

11. Radiology report dated September 9, 2010, interpreted by Dr. H. Rose (Exhibit M).

12. Clinical note of Dr. J. Pack dated September 14, 2010 (Exhibit N).

13. Authorization to return to work signed by Dr. J. Pack dated September 14, 2010 (Exhibit O).

14. Outpatient referral request signed by Dr. Pack on September 14, 2010 (Exhibit P).

15. Order of the Claim Administrator dated September 15, 2010 (Exhibit C).

16. Physical therapy note of physical therapist, H. Katchuk, dated September 15, 2010 (Exhibit Q).

17. Report of physical therapist, H. Katchuk, dated September 16, 2010 (Exhibit R).

18. Clinical note of Dr. J. Pack dated September 21, 2010 (Exhibit S).

19. Authorization to return to work signed by Dr. J. Pack dated September 21, 2010 (Exhibit T).

20. Outpatient referral request signed by Dr. J. Pack dated September 21, 2010 (Exhibit U).

21. Clinical note of Dr. Jo Pack dated September 28, 2010 (Exhibit V).

22. Return to work authorization signed by Dr. J. Pack dated September 28, 2010 (Exhibit W).

23. Radiology report from Greenbrier Valley Medical Center dated October 4, 2010 (Exhibit X).

24. Clinical note of Dr. J. Pack dated October 5, 2010 (Exhibit Y).

25. Return to work authorization signed by Dr. J. Pack dated October 5 and October 19, 2010 (Exhibit Z).

26. Physical therapy report of H. Katchuk dated October 8, 2010 (Exhibit AA).

27. Seneca job title dated October 12, 2010 (Exhibit BB).

28. Clinical note of Dr. Jo Pack dated October 19, 2010 (Exhibit CC).

29. Clinical note of Dr. J. Pack dated November 2, 2010 (Exhibit DD).

30. Transcript of testimony taken at expedited hearing on January 11, 2011 (Exhibit EE).

III. RULING OF THE WORKERS' COMPENSATION BOARD OF REVIEW

The Workers' Compensation Board of Review, by order dated June 21, 2011 (Exhibit A), properly affirmed the decision of the Office of Judges dated February 18, 2011 (Exhibit B), rejecting the compensability of this claim.

After reviewing the evidence submitted by both the claimant and the employer, as is noted in its decision, the Workers' Compensation Board of Review, by order dated September 14, 2011 (Exhibit A), properly accepted the findings of fact and conclusions of law before affirming the decision of the Administrative Law Judge dated February 4, 2011 (Exhibit B). The Administrative Law Judge had properly affirmed the Claims Administrator's order dated September 15, 2010 (Exhibit C), rejecting the claim, as the record shows that the claimant's injury was not incurred in the course of and as a result of her employment with the current employer. Furthermore, the Administrative Law Judge correctly noted and explained on page six of his decision:

> In the instant case, the claimant was not directed by her supervisor to assist Elisa Robinette to carry a box of maternity clothes out of her place of employment. The employer derived no special benefit from the removal of the box from the claimant's premises of employment and the act of moving the box could best be described as a voluntary act on the part of the claimant to assist a coworker in a personal errand. Borrowing from the philosophy of the Williby case, there does not appear to be, within the description of the claimant's job, an [sic] expressed or implied requirement that the claimant assist her coworkers in such activities of personal convenience notwithstanding the claimant's mistaken perception of her job responsibility. The counsel for the employer, in cross examination, attempted to elicit from the claimant an understanding of what the limits, as she perceived them, to her employment were and she could not describe same. While it is certainly arguable that the claimant needed additional instruction regarding her job responsibilities (the record, reflect she was a 10- year employee), the fact remains that there are always logical limits to what the claimant's job responsibilities were with regard to assisting coworkers. To the extent that she was assisting a coworker in a purely personal matter, and to such extent that the employer derived no benefit from the activity, it is clear that the claimant's injury sustained while assisting the coworker in removing a box filled with maternity clothes from the premises of the employer on September 1, 2010, resulting in a fall and injury to her right upper extremity, did not constitute a compensable injury under the West Virginia Workers' Compensation Statute.

IV. ASSIGNMENT OF ERROR

The claimant alleges the Board of Review's acceptance of the findings of the Office of Judges was clearly wrong in view of the reliable, probative and substantial evidence on the whole record. However, the decisions of both the Board of Review and the Office of Judges were consistent with the evidence and made in accordance with the law (Exhibits A and B).

The decision of the Workers' Compensation Board of Review was consistent with the evidence and made in accordance with the law. The claimant's rights were not prejudiced, as he did not show that he sustained a work-related injury on the date to the body part or the nature he alleged in his injury report. Instead, the claimant here asks this Court to substitute its judgment for the determinations regarding credibility and reliability made by the Administrative Law Judge. Such issues or requests have been addressed by the Court in Martin v. Randolph County Board of Education, 195 W. Va. 297, 465 S.E.2d 399 (1995), wherein the Court stated that as a general rule, "[W]e uphold the factual findings of an Administrative Law Judge if they are supported by substantial evidence .... We cannot overlook the role that credibility plays in factual determinations, a matter reserved exclusively for the trier of fact." Accordingly, the Supreme Court noted that deference should also be afforded 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. Martin, supra.

V. LEGAL AUTHORITIES

Conley v. Workers' Compensation Division,
199 W. Va. 196, 202, 483 S.E.2d 542, 545 (1997) 7

Emmel v. State Compensation Dir.,
150 W. Va. 277, 145 S.E.2d 29 (1965) 8

Frymier-Halloran v. Paige,
193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995) 11

In re Queen,
196 W. Va. 442, 473 S.E.2d 483 (1996) 11

Jordan v. State Workmens' Compensation Comm'r,
156 W. Va. 159, 164, 191 S.E.2d 497, 500 (1972) 8

Martin v. Randolph County Board of Education,
195 W. Va. 297, 465 S.E.2d 399 (1995) 5

Martin v. State Compensation Comm'r,
107 W. Va. 183, 149 S.E.2d. 824 (1929) 8

Rhodes v. Workers' Compensation Division,
209 W. Va. 8, 543 S.E.2d 289 (2000) 7

West Virginia Code § 23-4-1 8

West Virginia Code § 23-5-12(b) 7, 10

West Virginia Code § 23-5-12(b) (5) 11

West Virginia Code § 23-5-15(c) 6, 7

Williby v. W.V. Office of the Insurance Commissioner,
224 W.Va. 358, 686 S.E.2d W.Va. Lexis 99 (2009) 10

VI. STANDARD OF REVIEW

The standard for this Court for appellate review of decisions from the Board of Review is found in West Virginia Code § 23-5-15(c), which provides:

> If the decision of the board represents an affirmation of a prior ruling of either 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 provisions, is clearly the result of erroneous conclusions of law, or is based upon the boards' 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 ....

The standard of review applicable to the Board of Review on an appeal from an Administrative Law Judge is set out in West Virginia Code § 23-5-12(b), which provides, in pertinent part, as follows:

> [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.

Rhodes v. Workers' Compensation Division, 209 W. Va. 8, 543 S.E.2d 289 (2000).

The standard of review in West Virginia Code § 23-5-12(b) is the same as existed before the Board of Review was created. After May 12, 1995, the predecessor to the Board of Review, the Workers Compensation Appeal Board's, reviews were governed by the same standard. The West Virginia Supreme Court of Appeals has held "when the Workers' Compensation Appeal Board reviews a ruling from the Workers' Compensation Office of Judges it must do so under the standard of review set out in W. Va. Code § 23-5-12(b), and failure to do so will be reversible error." Syl. Pt. 6, Conley v. Workers' Compensation Division, 199 W. Va. 196, 202, 483 S.E.2d 542, 545 (1997); Rhodes, supra.

VII. LAW AND ARGUMENT

The issue before this Court is whether, under West Virginia Code § 23-5-15(c), the Board of Review decision dated June 21, 2011 (Exhibit A), was clearly wrong in affirming

the decision of the Administrative Law Judge dated February 4, 2011 (Exhibit B), in which the Office of Judges affirmed the Claims Administrator's September 15, 2010 (Exhibit C), order rejecting the compensability of this claim.

The sole issue before the Board of Review was whether there was sufficient evidence to support the decision of the Administrative Law Judge affirming the Claims Administrator's September 15, 2010 (Exhibit C), order rejecting the compensability of this claim. Based on the available facts and applicable law, the Administrative Law Judge correctly concluded that the preponderance of the evidence showed that the claimant's condition did not occur in the course of and resulting from her employment as required by West Virginia Code § 23-4-1.

West Virginia Code § 23-4-1 provides that an employee should receive compensation only for injuries and diseases received in the course of, and resulting from, employment. The Supreme Court of Appeals has held on its own question that when one incurs a disability personal to his own condition of health, though the disability may occur in the course of employment, it is not compensable. Jordan v. State Workmens' Compensation Comm'r, 156 W. Va. 159, 164, 191 S.E.2d 497, 500 (1972) (citing Martin v. State Compensation Comm'r, 107 W. Va. 183, 149 S.E.2d. 824 (1929)).

Furthermore, the claimant has the burden of showing the injuries that he or she alleges were caused in the course of, and resulting from, employment. Emmel v. State Compensation Dir., 150 W. Va. 277, 145 S.E.2d 29 (1965). Here the case of Emmel is not supportive of the claimant's position. In Emmel the Court explained:

> The two phrases, 'in the course of' and 'resulting from' are not synonymous and both elements must concur in order to make a claim compensable. The statute is in the conjunctive and not the disjunctive. Damron v. State Compensation Commissioner, 109 W.Va. 343, 155 S.E. 119; 21A M.J., Workmen's Compensation, § 31; 58 Am.Jur., Workmen's Compensation, § 210. Therefore, in the instant case it must be shown that the injury complained of occurred not only in the course of employment but also as a result of such employment. Id at 282.

Continuing on the Court stated:

> The following language is found in 58 Am.Jur., Workmen's Compensation, § 212: '* * * a workman not engaged in performing the particular duties for which he was employed, or in something incidental thereto, is not in the course of his employment, even though he may be in the general sphere of it * * *.' Id at 282.

Simply put, here the Administrative Law Judge sat as trier of fact with the unique opportunity to listen to the questions presented and the answers given as well as observe the claimant's demeanor as she gave those answers. In so doing, he was in the best position to process the claimant's responses in real time and note on page six of his decision:

> In the instant case, the claimant was not directed by her supervisor to assist Elisa Robinette to carry a box of maternity clothes out of her place of employment. The employer derived no special benefit from the removal of the box from the claimant's premises of employment and the act of moving the box could best be described as a voluntary act on the part of the claimant to assist a coworker in a personal errand. Borrowing from the philosophy of the Williby case, there does not appear to be, within the description of the claimant's job, an expressed or implied requirement that the claimant assist her coworkers in such activities of personal convenience notwithstanding the claimant's mistaken perception of her job responsibility....To the extent that she was assisting a coworker in a purely personal matter, and to such extent that the employer derived no benefit from the activity, it is clear that the claimant's injury sustained while assisting the coworker in removing a box filled with maternity clothes from the premises of the employer on September 1, 2010, resulting in a fall and injury to her right upper extremity, did not constitute a compensable injury[.]

See (Exhibit C).

Furthermore, the claimant admitted during her testimony that Elisa Robinette, the person she was assisting when she was injured, was not her supervisor, had never before given her directions or made requests of the claimant during the course of the claimant's employment, did not work in the office with the claimant. As a result, anything that the claimant was doing for Ms. Robinette was voluntary and not at the direction or instruction of either a supervisor or part of any articulated job duty. Instead, she was acting purely voluntarily in a personal capacity assisting in a purely personal activity of helping take maternity clothes to a car.

Thus, the Administrative Law Judge was absolutely correct in his assessment of what the claimant's duties were as supported and set forth in the claimant's job title and description dated October 12, 2010, which defined those duties as: "typing, formatting, editing, retrieving and copying data; contributing to the daily efficient operations by collecting information; scheduling and monitoring client appointments; collecting prior balances; facilitating communications by answering the telephone; processing data; securing information while adhering to HIPAA regulations; maintaining professional knowledge by participating in training opportunities and performing other duties assigned by the supervisor" (Exhibit BB).

With such being the claimant's duties, it is certainly not clearly wrong to determine as the Administrative Law Judge did that, "The employer derived no special benefit from the removal of the box from the claimant's premises of employment and the act of moving the box could best be described as a voluntary act on the part of the claimant to assist a coworker in a personal errand." Consequently, when the claimant argues in her brief that, "It is clear that the claimant received an injury and that the injury occurred in the course of her employment" and that the Administrative Law Judge's ruling of February 4, 2011, is clearly wrong and must be reversed pursuant to WV Code § 23-5-12(b), it is the claimant that is clearly wrong as the factual conclusion drawn by the Administrative Law Judge is definitely plausible and reasonable as the claimant was by her admission engaged in a personal activity delivering maternity clothes for a nonemployee of her own volition. Again, no supervisor or other employee directed the claimant to take the action that she did as it was unrelated to her employment and not for the benefit of the employer. The question is simply not whether she was on the employer's premises at the time of her injury, but whether while on those premises was she performing her duties or somehow acting for the employer's benefit. She was not.

Clearly, the Administrative Law Judge recognized that in Williby v. W.V. Office of the Insurance Commissioner, 224 W.Va. 358, 686 S.E.2d W.Va. Lexis 99 (2009), the claimant was literally not on the premises of the employer at the time of her injury. However, the lack of benefit to the employer and the action being taken by the claimant outside of her job duties,

which is overlooked by the claimant, are the points being made by the Administrative Law Judge when he stated:

> Borrowing from the philosophy of the Williby case, there does not appear to be, within the description of the claimant's job, an expressed or implied requirement that the claimant assist her coworkers in such activities of personal convenience notwithstanding the claimant's mistaken perception of her job responsibility....To the extent that she was assisting a coworker in a purely personal matter, and to such extent that the employer derived no benefit from the activity, it is clear that the claimant's injury sustained while assisting the coworker in removing a box filled with maternity clothes from the premises of the employer on September 1, 2010, resulting in a fall and injury to her right upper extremity, did not constitute a compensable injury[.]

See (Exhibit B).

While it is clearly the claimant's position that the Administrative Law Judge was clearly wrong, said position is contrary to the above mentioned standard of review set out in W. Va. Code § 23-5-12(b) (5). Said standard is a deferential one, which presumes the Office of Judges decisions are correct and not reversible as long as supported by substantial evidence as they are here. Syl. Pt. 3, In re Queen, 196 W. Va. 442, 473 S.E.2d 483 (1996); Frymier-Halloran v. Paige, supra; Conley, supra; Rhodes, supra. Again, here the Administrative Law Judge sat as trier of fact with the unique opportunity to listen to the questions presented and the answers given in addition to ask questions himself, as well as observe the claimant's demeanor as she gave those answers. Furthermore, determinations regarding credibility and reliability by an Administrative Law Judge have been addressed by the Supreme Court in Martin wherein as cited above, the Court stated that as a general rule, "[W]e uphold the factual findings of an Administrative Law Judge if they are supported by substantial evidence .... We cannot overlook the role that credibility plays in factual determinations, a matter reserved exclusively for the trier of fact." Martin, supra.

Although the employer must take the employee as he finds him/her — with all his/her attributes and all of his/her previous infirmities, the employer, by subscribing to the

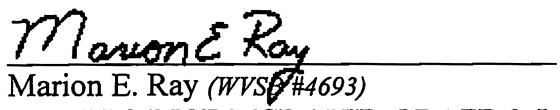
workers' compensation fund, does not thereby become the employee's insurer against all ills or injuries which may befall him/her. Jordan.

VIII. RULING REQUESTED

The claimant has not submitted sufficient evidence to demonstrate either that the decision of the Workers' Compensation Board of Review (Exhibit A) or the Administrative Law Judge's decision (Exhibit B) were wrong as a matter of law, or that each cannot be supported by the evidence of record. The Administrative Law Judge properly explained the basis for his decision, assessed the credibility of the witness, and demonstrated why and how he correctly affirmed the Claims Administrator's order dated September 15, 2010 (Exhibit C), rejecting the claim, as the record shows that the claimant's injury was not incurred in the course of and as a result of her employment. Accordingly, the employer requests that this Court AFFIRM the decision of the Workers' Compensation Board of Review below.

Respectfully submitted,

SENECA HEALTH SERVICES, INC.
By Counsel



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APPENDIX TO BRIEF ON
BEHALF OF APPELLEE,
SENECA HEALTH SERVICES, INC.

EXHIBIT A: Ruling of the Workers' Compensation Board of Review dated September 14, 2011

EXHIBIT B: Decision of the Administrative Law Judge dated February 4, 2011

EXHIBIT C: Claims Administrator's order dated September 15, 2010

EXHIBIT D: Staff incident/injury report dated September 1, 2010

EXHIBIT E: Correspondence from Dr. Joe M. Pack to counsel for the claimant dated January 3, 2010 (actually January 3, 2011)

EXHIBIT F: Clinical note of Dr. P. Ryan dated September 1, 2010

EXHIBIT G: Radiology report dated September 1, 2010, interpreted by Dr. H. Rose.

EXHIBIT H: Clinical note of Dr. J. Pack dated September 7, 2010

EXHIBIT I: Authorization to return to work from Jackson River Orthopedics dated September 7, 2010

EXHIBIT J: Employee and Physician's Report of Injury dated September 7, 2010

EXHIBIT K: Authorization to return to work completed by Dr. J. Pack dated September 8, 2010

EXHIBIT L: Clinical note of Dr. J. Pack dated September 8, 2010

EXHIBIT M: Radiology report dated September 9, 2010, interpreted by Dr. H. Rose

EXHIBIT N: Clinical note of Dr. J. Pack dated September 14, 2010.

EXHIBIT O: Authorization to return to work signed by Dr. J. Pack dated September 14, 2010

EXHIBIT P: Outpatient referral request signed by Dr. Pack on September 14, 2010

EXHIBIT Q: Physical therapy note of physical therapist, H. Katchuk, dated September 15, 2010

EXHIBIT R: Report of physical therapist, H. Katchuk, dated September 16, 2010

EXHIBIT S: Clinical note of Dr. J. Pack dated September 21, 2010

EXHIBIT T: Authorization to return to work signed by Dr. J. Pack dated September 21, 2010

EXHIBIT U: Outpatient referral request signed by Dr. J. Pack dated September 21, 2010

EXHIBIT V: Clinical note of Dr. Jo Pack dated September 28, 2010

EXHIBIT W: Return to work authorization signed by Dr. J. Pack dated September 28, 2010

EXHIBIT X: Radiology report from Greenbrier Valley Medical Center dated October 4, 2010

EXHIBIT Y: Clinical note of Dr. J. Pack dated October 5, 2010

EXHIBIT Z: Return to work authorization signed by Dr. J. Pack dated October 5 and October 19, 2010

EXHIBIT AA: Physical therapy report of H. Katchuk dated October 8, 2010

EXHIBIT BB: Seneca job title dated October 12, 2010

EXHIBIT CC: Clinical note of Dr. Jo Pack dated October 19, 2010

EXHIBIT DD: Clinical note of Dr. J. Pack dated November 2, 2010

EXHIBIT EE: Transcript of testimony taken at expedited hearing on January 11, 2011

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CERTIFICATE OF SERVICE

I, Marion E. Ray, attorney for the Appellee, Seneca Health Services, Inc., do hereby certify that a true and exact copy of the foregoing "Brief on Behalf of Appellee, Seneca Health Services, Inc.," was served upon the Appellant by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 7th day of November, 2011, addressed as follows:

Reginald D. Henry, Esquire
600 Neville Street, Suite 200
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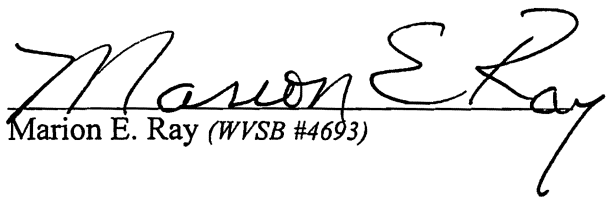

Marion E. Ray *(WVSB #4693)*