WV SUPREME COURT SIGNIFICANT WORKERS' COMPENSATION CASE LAW UPDATE

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WV APPELLATE REORGANIZATION ACT

- Effective July 1, 2022
- Office of Judges replaced by Board of Review ("BOR")
- Established Intermediate Court of Appeals ("ICA")
- Written opinions, orders, or decision from ICA are binding precedent unless overturned or modified on appeal
- Appeals from ICA go to WV Supreme Court of Appeals – discretionary review

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PREEXISTING CONDITIONS

- *Gill v. City of Charleston*, 783 S.E.2d 857 (W. Va. 2016)
- City of Charleston firefighter
- History of low back problems requiring maintenance treatment up to two days prior to date of injury
- Alleged lumbar sprain/strain while moving a CPR dummy during training exercise
- Course of treatment unchanged after alleged sprain/strain injury; claimant continued on course of conservative care instituted prior to date of injury

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PREEXISTING CONDITIONS

- "We therefore make clear, and so hold, that a noncompensable preexisting injury may not be added as a compensable component of a claim for workers' compensation medical benefits merely because it may have been aggravated by a compensable injury. To the extent that the aggravation of a noncompensable preexisting injury results in a discreet new injury, that new injury may be found compensable."
- What constitutes a "discreet new injury"?

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PREEXISTING CONDITIONS

- *Moore v ICG Tygart Valley, LLC*, 879 S.E.2d 779 (W. Va. 2022)
- 48-year old shuttle car operator sustains neck and shoulder injuries in accident
- Post-accident MRI study reveals degenerative conditions of cervical spine
- Dr. Jin did not believe claimant had sustained a discreet new injury; claimant treated by Dr. Vaglienti/Dr. France who wished to add spondylosis with radiculopathy
- Supreme Court holds that claimant established a causal connection between cervical radiculopathy and the work injury

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PREEXISTING CONDITIONS

- *Moore v ICG Tygart Valley, LLC*, 879 S.E.2d 779 (W. Va. 2022)
- Syllabus Pt. 5:
  - A claimant's disability will be presumed to have resulted from the compensable injury if: (1) before the injury, the claimant's preexisting disease or condition was asymptomatic, and (2) following the injury, the symptoms of the disabling disease or condition appeared and continuously manifested themselves afterwards. There still must be sufficient medical evidence to show a causal relationship between the compensable injury and the disability, or the nature of the accident, combined with the other facts of the case, raises a natural inference of causation. This presumption is not conclusive; it may be rebutted by the employer.

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COMPENSABILITY

- *Hood v. Lincare Holdings, Inc.*, 21-0754 (W. Va. Nov 08, 2023)
- Claimant delivering oxygen cannisters to customer when he felt a pop and burn in his right knee while descending stairs
- No slip/trip/fall; claimant not carrying anything at the time
- Office of Judges and Board of Review affirmed rejection of claim
- Supreme Court looks to "increased risk" test
- Court finds that claimant's act of descending a short staircase did not increase his risk of injury and affirmed the rejection of the claim

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COMPENSABILITY

- *Hood v. Lincare Holdings, Inc.*, 21-0754 (W. Va. Nov 08, 2023)
- Syllabus Pt 4: In the context of workers' compensation law, there are four types of injury-causing risks commonly faced by an employee at work: (1) risks directly associated with employment; (2) risks personal to the claimant; (3) mixed risks; and (4) neutral risks.
- Syllabus Pt 5: The factfinder may use the increased-risk test when deciding whether an employee sustained a compensable injury under West Virginia Code § 23-4-1(a) (2018), in cases where the injury occurred while the employee was engaged in a neutral risk activity. Under the increased-risk test, even if the risk faced by the employee is not qualitatively peculiar to the employment, the injury may be compensable if he faced an increased quantity of a risk.

INTOXICATION

- *Hart v. Panhandle Cleaning*, 21-0853 (W.Va. Nov. 08, 2023)
- Claimant fell 17 feet from a lift and suffered multiple injuries
- Blood was taken at the hospital and revealed a BAC of .053.
- Claim was denied per the statutory intoxication defense under W.Va. Code § 23-4-2(a).
- Claimant did not challenge the results of the blood test and admitted he was a heavy drinker but was not drunk or hungover at the time of the accident.

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INTOXICATION

- *Hart v. Panhandle Cleaning*, 21-0853 (W.Va. Nov. 08, 2023)

- W.Va. Code § 23-4-2(a) provides, no employee or dependent of any employee is entitled to receive any sum under the provisions of this chapter on account of any personal injury to or death to any employee caused by a self-inflicted injury or the intoxication of the employee. Upon the occurrence of an injury which the employee asserts, or which reasonably appears to have, occurred in the course of and resulting from the employee's employment, the employer may require the employee to undergo a blood test for the purpose of determining the existence or nonexistence of evidence of intoxication: Provided, That the employer must have a reasonable and good faith objective suspicion of the employee's intoxication and may only test for the purpose of determining whether the person is intoxicated. If any blood test for intoxication is given following an accident, at the request of the employer or otherwise, and if any of the following are true, the employee is deemed intoxicated and the intoxication is the proximate cause of the injury:

  (1) If a blood test is administered within two hours of the accident and evidence that there was, at that time, more than five hundredths of one percent, by weight, of alcohol in the employee's blood. . .

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INTOXICATION

- *Hart v. Panhandle Cleaning*, 21-0853 (W.Va. Nov. 08, 2023)

- The Court held that the plain language of the statute is unambiguous and once intoxication has been established, the statute provides two mandatory directions: (1) the employee is deemed intoxicated; and (2) the intoxication is the proximate cause of the injury.

- The statute provides no language permitting a claimant to rebut intoxication once established.

- Note: the *Hart* decision is a memorandum decision. and does not have the same precedential value as a published opinion

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APPORTIONMENT

- *Duff v. Kanawha Cnty Comm'n*, 23-43 (W. Va. Apr 22, 2024)
- Sheriff's deputy alleges back injury while lifting bomb detector robot
- Dr. Mukkamala IME vs Dr. Guberman IME
- Mukkamala (and Dr. Soulsby) apportion 50% of impairment to pre-existing conditions
- Board of Review and ICA affirm rating from Mukkamala
- Supreme Court of Appeals reverses citing a lack of "reasoning and rationale" in Mukkamala's apportionment

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APPORTIONMENT

- *Duff v. Kanawha Cnty Comm'n*, 23-43 (W. Va. Apr 22, 2024)
- Syllabus Pt 6: Under West Virginia Code § 23-4-9b (2003), the employer has the burden of proving apportionment is warranted in a workers' compensation case. This requires the employer to prove the claimant "has a definitely ascertainable impairment resulting from" a preexisting condition(s). This requires that employer prove that the preexisting condition(s) contributed to the claimant's overall impairment after the compensable injury and prove the degree of impairment attributable to the claimant's preexisting condition(s).

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APPORTIONMENT

- *Logan-Mingo Area Mental Health, Inc. v. Lester* (June 10, 2024)
- Claimant fell off ladder and suffered multiple injuries, including injuries to thoracic and lumbar spine
- Had a prior injury in 1999 also involving his thoracic and lumbar spine
- Granted a 20% PPD award for 1999 claim based on WPI of 14% for lumbar spine and 7% WPI for thoracic spine

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APPORTIONMENT

- *Logan-Mingo Area Mental Health, Inc. v. Lester* (June 10, 2024)
- Dr. Guberman IME:
  - 19% PPD – Guberman reached this percentage by first reducing each distinct impairment by the amount of the previous award for same body part. Aggregate impairment ratings (39%) equaled more than his actual WPI (30%)
- Dr. Thaxton Review:
  - 10% PPD – Proper method of apportionment is to deduct total amount of preexisting impairment (20%) from total amount of current unapportioned WPI (30%)

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APPORTIONMENT

- *Logan-Mingo Area Mental Health, Inc. v. Lester* (June 10, 2024)

- Syllabus point 2: " When a claimant has preexisting, definitely ascertained impairments to multiple body parts and then sustains new compensable injuries that affect the previously impaired body parts, the proper method for apportioning the preexisting impairments is to first determine the claimant's total, unapportioned whole-person impairment using the Combined Values Chart of the American Medical Association's Guides to the Evaluation of Permanent Impairment (4th ed. 1993). Then, the total amount of the claimant's preexisting impairment that has been definitely ascertained must be deducted from the total, unapportioned whole-person impairment to calculate the amount of the claimant's Permanent Partial Disability award."

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APPORTIONMENT

- *Logan-Mingo Area Mental Health, Inc. v. Lester* (June 10, 2024)
- Dr. Guberman's method of apportionment "does not comply with the legislative mandate that "[c]ompensation shall be awarded only in the amount that would have been allowable had the employee not had the preexisting impairment." W.Va. Code § 23-4-9b.
- The Court noted Dr. Guberman's method could result in a claimant being awarded greater than 100% PPD for multiple injuries, and such a result would require an absurd interpretation of W.Va. Code § 23-4-9b.

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