

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

BRIAN K. WILKINS,
Claimant Below, Petitioner

vs.) **No. 15-0487** (BOR Appeal No. 2050070)
(Claim No. 2011027736)

AKER CONSTRUCTION,
Employer Below, Respondent

FILED

June 14, 2016
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Brian K. Wilkins, by M. Jane Glauser, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Aker Construction, by Bradley A. Crouser, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 30, 2015, in which the Board affirmed a November 19, 2014, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 5, 2014, decision which denied a request to add herniated cervical disc and intervertebral disc degeneration as compensable components of the claim as well as a request for orthopedic consultation and physical therapy. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Wilkins, a pipefitter, was injured in the course of his employment on September 24, 2010, when he struck his head on a pipe. He sought treatment that evening from Greta Massey, M.D. At that time, he reported stiffness and a burning sensation in his neck. A cervical CT showed no acute cervical spine injury, but it did reveal chronic intervertebral disc herniations at C6-7 with partial calcification. Dr. Massey noted degenerative disc disease. She diagnosed no acute cervical spine injury and chronic intervertebral disc herniations at C6-7. A cervical MRI

taken on October 7, 2010, revealed degenerative changes present at C6-7 consisting of a generalized bulge with osteophyte formation. There were also minimal degenerative changes at C3-4. Mr. Wilkins testified in a hearing before the Office of Judges on October 25, 2012, that he did not miss any work for the compensable injury. He stated that he underwent physical therapy and recovered 90% to 95%.

Mr. Wilkins' symptoms returned a year and a half later, and in January of 2012, Mary Gainer, M.D., requested a cervical MRI and physical therapy. In a physician review, Rebecca Thaxton, M.D., recommended denying the request. She determined that the claim was held compensable for a cervical sprain/strain and that Mr. Wilkins had exceeded the treatment guidelines for such an injury. She further found that his symptoms resolved following the compensable injury, and the current symptoms necessitating an MRI were not related to the compensable injury. The claims administrator denied the cervical MRI on February 15, 2012.

On February 28, 2012, a cervical MRI revealed moderate central canal stenosis at C6-7 and mild left sided and moderate right sided neural foraminal stenosis. All of the findings were unchanged from the October 7, 2010, MRI. In a March 28, 2012, treatment note, Terrence Julien, M.D., noted that Mr. Wilkins had a history of neck pain and right hand numbness that had increased over the past three months. Dr. Julien diagnosed cervical spondylosis and degenerative disc disease. He recommended physical therapy.

In an April 16, 2012, physician review, Prasadarao Mukkamala, M.D., recommended denying a request to reopen the claim for medical treatment. He found that Mr. Wilkins suffered from pre-existing degenerative changes and a chronic disc herniation at C6-7. Dr. Mukkamala opined that he sustained a cervical strain as a result of the compensable injury, and further treatment for the sprain a year and a half after the injury was not necessary. Dr. Gainer disagreed in a May 10, 2012, letter and opined that the original neck injury in the claim was a herniated disc at C3-4, not a neck sprain. She requested that the accepted diagnosis be reevaluated and the claim reopened for medical benefits.

The claims administrator denied requests for physical therapy and an MRI on May 31, 2012. The Office of Judges affirmed the decision on June 2, 2013. It determined that the claim was only compensable for a cervical sprain and that the requested treatment was necessary for pre-existing degenerative changes and disc herniations. Mr. Wilkins was thereafter treated by Dr. Gainer for intervertebral disc degeneration and a herniated C6-7 disc. The claims administrator again denied a request for physical therapy on December 18, 2013. In that decision, it also denied a request to add herniated disc and intervertebral disc degeneration to the claim as well as a request for an orthopedic consultation. Mr. Wilkins protested the decision, and the StreetSelect Grievance Board determined on February 4, 2014, that the requests should be denied. It found that the claim was held compensable for only a cervical sprain, and Mr. Wilkins did not lose any time from work for the injury. Additionally, he has documented pre-existing degenerative disc disease. It also noted that the Office of Judges previously affirmed denials of requests for physical therapy and an MRI. The claims administrator thereafter denied the requests on February 5, 2014.

The Office of Judges affirmed the claims administrator's decision in its November 19, 2014, Order. It found that a preponderance of the evidence does not support the addition of herniated disc and intervertebral disc degeneration to the claim. The Office of Judges found that a September 2010 CT scan showed pre-existing degenerative changes at C6-7 and C3-4 as well as herniations. The Office of Judges noted that Mr. Wilkins, by his own admission, recovered 90% to 95% after a trial of physical therapy completed in late 2010. He did not request treatment again until January of 2012. The Office of Judges found that he admitted in a hearing that he was performing a different job for a new employer when the pain in his neck recurred. His new job required him to maneuver under sinks to attach pipe which placed him in awkward positions. Given the extensive degenerative changes found on x-ray and MRI, the Office of Judges determined that it was unsurprising that the pre-existing conditions were aggravated. The Office of Judges therefore concluded that it was not arbitrary to consider the disc changes at C6-7 and C3-4 as chronic. It was noted in the CT and MRI taken shortly after the injury occurred that the C6-7 disc was calcified, which indicates the changes were present for quite some time before the compensable injury. The Office of Judges therefore affirmed the denial of the addition of herniated cervical disc and intervertebral disc degeneration to the claim. Because the conditions were determined not to be the result of the compensable injury, the Office of Judges also denied the requested medical treatment. It found that the treatment was necessary for Mr. Wilkins' pre-existing degenerative changes and not the compensable cervical sprain. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on April 30, 2015.

On appeal, Mr. Wilkins argues that there is no evidence of pre-existing symptoms in the cervical spine prior to the compensable injury. He asserts that the injury aggravated the pre-existing cervical conditions. He argues that he is entitled to further treatment and that the treatment is necessary for the compensable injury as well as the pre-existing condition. Aker Construction argues that Mr. Wilkins has chronic, pre-existing degenerative disc disease in his cervical spine, and the compensable injury was merely a sprain. It asserts that the requested conditions and treatment are necessary for pre-existing conditions and not the compensable injury.

After review, we agree with the reasoning of the Office of Judges and the conclusions of the Board of Review. Mr. Wilkins sustained a cervical sprain in the course of his employment for which he was adequately treated with physical therapy. His symptoms largely resolved, and he did not seek treatment for over a year and a half. The diagnostic evidence shows that Mr. Wilkins suffered from degenerative changes and a C6-7 herniation well before the compensable injury occurred. They also showed degenerative changes present at the C3-4 disc. A preponderance of the evidence shows that Mr. Wilkins sustained a cervical sprain in the course of his employment for which he was adequately treated and recovered. His current symptoms developed at his new place of employment and appear to be the result of pre-existing, non-compensable degenerative changes.¹

¹ The Court notes that its recent decision in *Gill v. City of Charleston*, No. 14-0983, at *11 (Feb. 10, 2016), has no bearing on this case. Mr. Wilkins requests that a new compensable condition be added to the claim and does not allege an aggravation of a non-compensable injury or a discreet new injury.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: June 14, 2016

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Allen H. Loughry II