

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

MICHAEL MCGEE,
Claimant Below, Petitioner

FILED
November 22, 2017
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 17-0235** (BOR Appeal No. 2051510)
(Claim No. 2016026235)

HENDERSHOT PLUMBING,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Michael McGee, by Robert L. Stultz, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Hendershot Plumbing, by Patricia E. McEnteer, its attorney, filed a timely response.

The issue on appeal is whether the claim should be held compensable. This appeal originated from the May 19, 2016, claims administrator's decision rejecting the claim. In its August 22, 2016, Order, the Workers' Compensation Office of Judges affirmed the decision. The Board of Review's Final Order dated February 17, 2017, affirmed the Order of the Office of Judges. 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.

Michael McGee, a service technician for Hendershot Plumbing, alleges that he was injured in the course of his employment on February 18, 2016, when he was attempting to remove a hot water heater from a recently flooded basement. Mr. McGee alleges that he slipped in mud and fell backwards, hitting his back on a concrete wall. Mr. McGee finished his shift and worked the next day as well, only reporting to the emergency room on February 20, 2016, after falling in the shower and reinjuring himself.

The emergency room report noted that Mr. McGee had an extensive medical history including sciatica, hypertension, musculoskeletal disorders, chronic back pain, neck pain with a herniated disc, and two bulging discs. Medical records show that Mr. McGee injured his low back on December 6, 2014, when he stood from bent position and twisted his back. Mr. McGee felt a popping sensation and experienced immediate pain. He remained off work for three months and was eventually diagnosed with a variety of conditions including chronic low back pain with left lower extremity radicular pain, lumbar disc degeneration, lumbar spondylosis, and myofascial pain. An MRI also showed left foraminal stenosis with L4-5 articular disease.

After reporting his prior medical history, Mr. McGee underwent an x-ray of the lumbar spine which revealed no fracture. Bilateral hip x-rays and a knee x-ray reported no abnormality was detected. Mr. McGee was diagnosed with lumbar strain, left hip pain, and left knee abrasion. Mr. McGee's pain worsened and on March 21, 2016, he sought treatment from Victorico Singzon, M.D., for complaints of lower back pain. Dr. Singzon diagnosed lumbar back pain and spondyloarthropathy. Mr. McGee was sent for a lumbar MRI on March 29, 2016, which noted small to moderate left lateral – far lateral disc herniation with left neural foraminal encroachment at L4-5 and compression of the L4 nerve root. There was no spinal stenosis. A minimal disc bulge was noted at L3-4.

On April 5, 2016, Mr. McGee sought treatment from Bill Underwood, M.D., the doctor who treated him following his injury in 2014. Mr. Underwood noted that following the December 6, 2014, injury, Mr. McGee did not follow-up with his office or undergo the recommended treatment. Regarding the recent alleged injury, Dr. Underwood's assessment was lumbar disc herniation, nerve root compression, and lumbosacral radiculopathy at L4. On April 10, 2016, Mr. McGee presented at the emergency room with complaints of incontinence and increasing back pain with numbness and tingling in the lower extremities. Mr. McGee subsequently completed a Report of Occupational Injury. Under the physician's section, the hospital listed the body parts injured as the lumbar spine, left hip, and knee. The claims administrator rejected the claim on May 19, 2016, stating that Mr. McGee did not seek medical treatment until he sustained a non-work-related injury when he slipped and fell in the shower. The claims administrator also noted that medical records documented pre-existing conditions of chronic back and hip pain.

On June 21, 2016, Mr. McGee testified in a deposition that on February 18, 2016, he was working in the basement of a home that had recently flooded. The floors were covered with mud and on attempting to remove a hot water heater, Mr. McGee slipped and fell backwards into a concrete wall. Mr. McGee felt instant pain in his back and leg but completed the job and reported the injury to his boss that evening upon returning to the shop. Mr. McGee testified that on February 20, 2016, his leg gave out while he was in the shower and he fell, hitting his knee. At that time, Mr. McGee presented at the emergency room and explained that he had injured himself at work two days prior. Mr. McGee addressed his prior injury and testified that in 2014, he popped his hip out of place. He explained that the nature of that injury was his hip only, not his back. Mr. McGee testified that he did not undergo treatment or take pain medications between that injury and February 18, 2016. During subsequent treatment, Mr. McGee was diagnosed with a disc herniation and his only option was to undergo a lumbar discectomy, which

was performed on June 9, 2016. On cross examination, Mr. McGee admitted that he had a history of chronic back pain. He stated that he did not file a report until April of 2016 because he was unaware that one was required.

On July 14, 2016, Mark Hendershot, the owner of Hendershot Plumbing, testified in a deposition that on February 18, 2016, he and Mr. McGee were to work in the basement of a home that had flooded the prior week. They were to replace the hot water heater and repair a furnace. The wrong hot water heater had been delivered to the work site, and Mr. Hendershot testified that he sent Mr. McGee on to the home to begin disconnecting the broken hot water heater while he, Mr. Hendershot, returned the incorrect heater. When he arrived, Mr. Hendershot noted that Mr. McGee was in the basement and had already disconnected the broken heater and moved it across the room. Mr. Hendershot testified that he assisted Mr. McGee in taking the hot water heater out of the basement and up to the van. Mr. Hendershot stated that Mr. McGee did not report an injury nor did he appear to be in any discomfort when the two of them removed the old hot water heater or installed the new one. Mr. McGee did not claim any injury until the following week. Mr. Hendershot stated that Mr. McGee continued with his regular job duties until April. Mr. Hendershot testified that Mr. McGee had worked for him for three to four years and had always been a good employee.

An expedited hearing took place on July 26, 2016. Mr. McGee's counsel, Mr. Stultz, stated that the injury occurred while trying to remove a hot water heater from a basement. Mr. Stultz argued that Mr. McGee was working alone when it happened and that sufficient medical evidence existed to support holding the claim compensable. Counsel for the employer, Ms. McEnteer, stated that Mr. Hendershot's testimony was contrary to Mr. McGee's version of the events and called into question his credibility. Ms. McEnteer argued that no compensable injury occurred on February 18, 2016.

By Order dated August 22, 2016, the Office of Judges affirmed the claims administrator's decision rejecting the claim. The Office of Judges relied heavily on the employer's closing argument, which stated that Mr. McGee's testimony was in direct contrast to that of Mr. Hendershot. Mr. McGee asserted that he was alone while he moved the hot water heater while Mr. Hendershot testified that he helped Mr. McGee move the heater. Mr. Hendershot further stated that he did not learn of the alleged injury until the following week. It was the employer's position that Mr. Hendershot's testimony completely undermined the credibility of Mr. McGee. Also noted were the medical records which reflected significant medical history including musculoskeletal disorder, chronic back pain, and two bulging discs.

Pre-injury records revealed that Mr. McGee sustained an injury on December 6, 2014. Mr. McGee complained of severe low back pain that radiated into his left lower extremity. The diagnosis at that time was chronic low back pain with left lower extremity radicular pain, lumbar disc degeneration, lumbar spondylosis, and myofascial pain. The employer argued that the preponderance of the evidence established that Mr. McGee did not sustain a work-related injury. After reviewing the employer's closing argument, the Office of Judges concluded that a preponderance of the evidence established that no compensable injury occurred on February 18, 2016. The testimony of Mr. Hendershot was found to be persuasive and directly contradictory to

Mr. McGee's version of events. Accordingly, the Office of Judges found that the claim is not compensable. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on February 17, 2017.

After review, we agree with the decision of the Office of Judges as affirmed by the Board of Review. Mr. McGee has a significant history of low back pain dating back to 2014. Notably, many of the symptoms reported then are the ones he suffers from now. Further, Mr. Hendershot's testimony has been found credible and is in contradiction to Mr. McGee's testimony. The denial of the claim is supported by the evidence of record.

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: November 22, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Elizabeth D. Walker