

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**HENRY J. COEN,  
Claimant Below, Petitioner**

**FILED**

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

vs.) **No. 17-0477** (BOR Appeal No. 2051543)  
(Claim No. 2015033270)

**LITMAN EXCAVATING, INC.,  
Employer Below, Respondent**

**MEMORANDUM DECISION**

Mr. Coen seeks the addition of several diagnoses involving the lower back as compensable components of his claim for workers' compensation benefits following a compensable right lower extremity fracture. On April 8, 2016, the claims administrator denied a request to add degenerative disc disease of the lumbar spine without myelopathy or radiculopathy, degenerative disc disease of the lumbar spine with radiculopathy, spondylosis of the lumbar spine without myelopathy or radiculopathy, and L4-5 and L5-S1 degenerative disc disease as compensable components of the claim. The Office of Judges affirmed the claims administrator's decision on July 13, 2016. This appeal arises from the Board of Review's Final Order dated April 24, 2017, in which the Board affirmed the Order of the Workers' Compensation 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. 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, we affirm the decision of the Board of Review.

Mr. Coen sustained a compensable right lower extremity fracture on September 29, 2014, when his right leg became entangled in a cellular telephone tower while unloading a vehicle. Three separate surgical procedures were required to repair the fracture, which were performed over the course of several months. On December 18, 2015, Mr. Coen sought treatment with Jacob Smith, D.O., his primary care physician, for complaints of increasing lower back pain. Dr. Smith noted that in March of 2014, Mr. Coen was diagnosed with degenerative disease in his lower back. X-rays obtained during the office visit revealed the presence of degenerative disc disease and spondylosis at L4-S1. Dr. Smith diagnosed Mr. Coen with degenerative disc disease of the lumbar spine without myelopathy or radiculopathy and degenerative disc disease of the

lumbosacral spine without radiculopathy. He then opined that, at most, the effects of the right lower extremity fracture exacerbated Mr. Coen's underlying degenerative disc disease.

A lumbar spine MRI performed on March 13, 2016, revealed multilevel degenerative disease, foraminal narrowing at L4-5, and a slight disc protrusion. On March 18, 2016, Mr. Coen returned to Dr. Smith for a follow-up examination. Dr. Smith noted that the March 13, 2016, MRI revealed the presence of degenerative disc disease and diagnosed Mr. Coen with degenerative disc disease of the lumbar spine without myelopathy or radiculopathy, degenerative disc disease of the lumbosacral spine with radiculopathy, lumbosacral spondylosis without myelopathy or radiculopathy, L4-5 and L5-S1 degenerative disc disease. He then opined that Mr. Coen's lower back pain could be caused by an antalgic gait arising from the compensable right lower extremity fracture.

On April 8, 2016, the claims administrator denied a request from Dr. Smith to add degenerative disc disease of the lumbar spine without myelopathy or radiculopathy, degenerative disc disease of the lumbar spine with radiculopathy, spondylosis of the lumbar spine without myelopathy or radiculopathy, and degenerative disc disease at L4-5 and L5-S1 as compensable components of Mr. Coen's claim for workers' compensation benefits. Prasadarao Mukkamala, M.D., performed a records review on June 21, 2016. Dr. Mukkamala noted that Mr. Coen did not complain about experiencing increased lower back pain until approximately eleven months after the occurrence of the right lower extremity fracture, and opined that the diagnoses made by Dr. Smith are representative of naturally-occurring degenerative changes which are not causally related to the September 29, 2014, right lower extremity fracture.

In its Order affirming the April 8, 2016, claims administrator's decision, the Office of Judges held that Mr. Coen failed to demonstrate that he sustained the diagnoses presently at issue in the course of and resulting from his employment. The Board of Review affirmed the reasoning and conclusions of the Office of Judges in its decision dated April 24, 2017. On appeal, Mr. Coen, by William Gallagher, his attorney, asserts that the evidence of record clearly demonstrates that he developed a discrete new injury in the lumbar spine as a result of an aggravation of his pre-existing degenerative disc disease arising from an antalgic gait caused by the compensable right lower extremity fracture. Therefore, he further asserts that the requested additional diagnoses should be added as compensable components of the claim. Litman Excavating, Inc., by Katherine Arritt and Jeffrey Brannon, its attorneys, asserts that the diagnoses presently at issue pre-existed the compensable injury and cannot be added as compensable components of the claim.

The Office of Judges found that the evidence of record clearly demonstrates the presence of pre-existing degenerative disease in Mr. Coen's lower back. Additionally, the Office of Judges noted that Dr. Smith has not requested the addition of any diagnosis which did not pre-exist the injury. The Office of Judges relied upon Dr. Mukkamala's conclusion that the additional diagnoses presently at issue represent naturally-occurring, pre-existing degenerative changes which are unrelated to the September 29, 2014, injury.

The Office of Judges then took note of our recent decision in *Gill v. City of Charleston*, 236 W.Va. 737, 783 S.E.2d 857 (2016), in which we held:

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.

Syl. Pt. 3, *Gill*. The Office of Judges also took note of Dr. Smith's conclusion that, at most, the compensable right lower extremity fracture aggravated Mr. Coen's pre-existing degenerative disease. Having already determined that the diagnoses presently at issue pre-existed the compensable injury, the Office of Judges concluded that aggravation of the pre-existing diagnoses cannot be added as compensable components of the claim in light of our decision in *Gill*. Likewise, the Board of Review evaluated the request to add the additional diagnoses as compensable components of the claim in light of our decision in *Gill*, and affirmed the reasoning and conclusions of the Office of Judges. We also agree with the reasoning and conclusions of the Office of Judges, as affirmed by the Board of Review.

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