

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

May 7, 2015

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

**ERGON, INC.,
Employer Below, Petitioner**

vs.) **No. 14-0741** (BOR Appeal No. 2049232)
(Claim No. 2011009900)

**ERIK ROHRBAUGH,
Claimant Below, Respondent**

MEMORANDUM DECISION

Petitioner Ergon, Inc., by Jeffrey B. Brannon, its attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Erik Rohrbaugh, by Christopher J. Wallace, his attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated June 27, 2014, in which the Board affirmed a January 29, 2014, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's November 16, 2012, decisions which denied the addition of L3-4 and L4-5 disc herniations to the claim; denied a reopening of the claim for temporary total disability benefits; denied authorization of a consultation with James D. Kang, M.D.; and denied authorization for a PMR consultation and two transforaminal epidural steroid injections.¹ The Office of Judges dismissed Mr. Rohrbaugh's protest of the claims administrator's decisions denying authorization of a consultation with Dr. Kang and denying authorization for a physical medicine and rehabilitation consultation with two transforaminal epidural steroid injections as moot. It reversed the decisions denying the addition of L3-4 and L4-5 disc herniations to the claim and denying a reopening of the claim for temporary total disability benefits. 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

¹ The only issues on appeal are the decisions denying additional compensable components and denying the request to reopen the claim for temporary total disability benefits.

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. Rohrbaugh, a maintenance employee, was injured in the course of his employment on August 6, 2010, while lifting a heavy box. Treatment notes by his treating physician, Joseph DiDomenico, D.C., from September to November of 2010 indicate that Mr. Rohrbaugh experienced a painful pop in his left lower back while lifting at work, and the pain gradually worsened. He reported pain in his left lower back that radiates into his left leg. It was noted that he has a history of chronic occasional lower back pain. X-rays showed no abnormalities, and he was diagnosed with acute lumbar sprain and sent to physical therapy. Mr. Rohrbaugh greatly improved with physical therapy and was able to continue to work without restrictions. Mr. Rohrbaugh experienced occasional flair-ups of his lower back pain. On October 17, 2011, Ted Hill, D.O., treated him for a lumbosacral strain after he did some yard work which included cutting wood and clearing brush. On January 21, 2012, Mr. Rohrbaugh sought treatment from Dr. DiDomenico after working long hours on a project at work. He reported pain in his lower back and left leg and was diagnosed with acute exacerbation of lumbar sprain. A lumbar MRI taken shortly thereafter showed multilevel degenerative changes and protrusions at L3-4 and L4-5 on the left causing contact of the exiting left-sided nerve roots. Dr. DiDomenico opined in a March 8, 2012, letter that Mr. Rohrbaugh's current symptoms and herniated discs are the result of a work-related aggravation and should be compensable components of the claim.

Sushi Sethi, M.D., performed an independent medical evaluation in March of 2012 in which he determined that Mr. Rohrbaugh suffered a lumbar sprain that should have resolved within three to six weeks. He had exhausted all appropriate medical treatment and had reached maximum medical improvement. Dr. Sethi opined that a previous 1992 back injury and non-occupational degenerative disease caused 90% of the delay in Mr. Rohrbaugh's recovery from the compensable injury. On January 24, 2013, the Office of Judges reversed a claims administrator's decision and authorized nine physical therapy visits and eleven chiropractic visits. It found that Dr. DiDomenico's opinion was more persuasive than Dr. Sethi's. It stated that Dr. Sethi evaluated Mr. Rohrbaugh two months prior to Dr. DiDomenico's treatment request and therefore did not directly address the issue of additional treatment. The Office of Judges found that the only direct evidence on the issue were the reports of Dr. DiDomenico, which indicated Mr. Rohrbaugh suffered an exacerbation of the compensable injury in the course of his employment. His opinion was found to be persuasive, and the Board of Review affirmed the Order.

Prasadarao Mukkamala, M.D., performed an independent medical evaluation on May 10, 2013, in which he diagnosed lumbar sprain. He opined that Mr. Rohrbaugh had reached maximum medical improvement and that there is no casual connection between his current symptoms and the compensable injury. He noted that he sustained an intervening event at his home while cutting wood and clearing weeds, which caused his current symptoms. Additionally, he found from a review of the MRI that the disc herniations are degenerative in nature. Dr. Mukkamala recommended denying the addition of L3-4 and L4-5 disc herniations to the claim and denying the request to reopen the claim for additional temporary total disability benefits.

Bill Hennessey, M.D., also performed an independent medical evaluation. On May 16, 2013, he noted that Mr. Rohrbaugh's symptoms were consistent with those he reported following the injury. He found that his back pain never completely subsided, and he underwent surgery on his L3-4 disc under private insurance. The surgery was successful in relieving his lower back and left leg pain. Dr. Hennessey opined that the evidence indicates the L3-4 and L4-5 herniations are related to the compensable injury. He stated that the mechanism of injury is consistent with herniated discs, and the L3-4 and L4-5 discs should be held compensable. In an August 12, 2013, supplemental report, Dr. Hennessey stated that he reviewed additional medical records provided to him. He stated that one of the records provided to him indicates Mr. Rohrbaugh was cutting wood and brush at home and had increased back pain. Dr. Hennessey found that it was highly unlikely that he could have continued to work in 2010 and 2011 if he had two herniated lumbar discs. He noted that an MRI taken on February 13, 2012, did not show herniated discs but a CT on June 22, 2012, showed two herniations. He therefore concluded that the disc herniations occurred between February and June of 2012. He asserted that after reviewing the additional medical evidence, it was clear that there was a lack of a causal connection between the compensable injury and the lumbar disc herniations.

During the course of the case before the Office of Judges, Ergon, Inc., requested that the reports of Dr. DiDomenico and Ashvin Ragoowansi, M.D., be expunged from the evidentiary record. It asserted the Office of Judges issued an Order compelling Mr. Rohrbaugh to produce the physicians for cross examination, but the physicians were never made available to Ergon, Inc.'s counsel. In an opposition to the motion, Mr. Rohrbaugh stated that he attempted several times to make the experts available to Ergon, Inc., but its counsel was never available. Mr. Rohrbaugh argued that he made a good faith effort. The Office of Judges denied the motion to expunge the evidence on November 25, 2013.

The claims administrator denied authorization for a PMR consultation and two transformational epidural steroid injections, denied authorization of a consultation with Dr. Kang, denied the addition of L3-4 and L4-5 disc herniations to the claim, and denied a request to reopen the claim for temporary total disability benefits on November 16, 2012. In its January 29, 2014, Order, the Office of Judges dismissed Mr. Rohrbaugh's protest of the claims administrator's decisions denying authorization of a consultation with Dr. Kang and denying authorization for a physical medicine and rehabilitation consultation with two transforaminal epidural steroid injections as moot because Mr. Rohrbaugh had already secured a second neurological opinion and underwent lumbar disc surgery. It reversed the decisions denying the addition of L3-4 and L4-5 disc herniations to the claim and denying a reopening of the claim for temporary total disability benefits and held the claim compensable for L3-4 and L4-5 disc herniations and reopened the claim for temporary total disability benefits.

The Office of Judges stated that the issue of whether Mr. Rohrbaugh sustained a compensable exacerbation of his August 6, 2010, injury was considered and resolved in its prior January 24, 2013, Order. The Office of Judges found that in the present case, Ergon, Inc., seeks to revisit the issue of whether Mr. Rohrbaugh's condition should be considered the result of an independent intervening cause under *Wilson v. Workers' Compensation Commissioner*, 174

W.Va. 611, 328 S.E.2d 485 (1984). In *Wilson*, this Court held that aggravations or progressions of a compensable injury that occur as a result of the claimant's customary activity, in light of their condition, are compensable. The Office of Judges found that the opinions of Drs. Mukkamala and Hennessey were contrary to the standard set forth in *Wilson*. Both physicians opined that Mr. Rohrbaugh sustained an intervening injury while he was at home chopping wood and clearing brush. The Office of Judges determined that even if his activities at home in October of 2011, and not the subsequent exertion at work in January of 2012, caused the disc herniations, such activity at home would not constitute an independent intervening factor. Mr. Rohrbaugh was found to be at maximum medical improvement in November of 2010 and nothing in the record indicates that his activities of cutting wood, working around the house, and clearing brush were more than his customary activities.

The Office of Judges concluded that nothing in Dr. Hill's October 17, 2011, treatment note was sufficient to warrant the exclusion of the otherwise binding precedent set by the January 24, 2013, Order. The activity briefly described in the treatment note was insufficient to show that Mr. Rohrbaugh's activity of cutting wood and clearing brush was inconsistent with his customary activity in light of his condition. The Office of Judges found that Dr. DiDomenico attributed the aggravation to increased work activity in his January of 2012 treatment note. The Office of Judges held that the evaluations by Drs. Mukkamala and Hennessey were insufficient to establish an independent intervening cause. Because the Office of Judges found the L3-4 and L4-5 disc herniations to be compensable components of the claim, it also found that the claim should be reopened for temporary total disability benefits. Temporary total disability benefits were awarded from April 27, 2012, through July 10, 2012, and further as substantiated by proper medical evidence. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on June 27, 2014.

On appeal, Ergon, Inc., argues that its rights were violated when the Office of Judges refused its motion to expunge the reports of Drs. Ragoowansi and DiDomenico. It asserts that West Virginia Code of State Rules § 93-1-7.4D (2008) states that when a party fails to produce an expert for cross-examination, the Office of Judges may expunge their report from the record. It argues in the alternative that Mr. Rohrbaugh has failed to prove that the additional components are causally connected to the compensable injury. Mr. Rohrbaugh argues that he made a good faith effort to present the experts for cross examination, and West Virginia Code of State Rules § 93-1-7.4D gives the Office of Judges the option, not the obligation, to strike the records. He also asserts that the record clearly establishes that he sustained a work place exacerbation of his compensable injury, which caused the herniated discs.

After review, we agree with the reasoning of the Office of Judges and the conclusions of the Board of Review. The Office of Judges previously found in its January 24, 2013, Order, that the herniated L3-4 and L4-5 discs were compensable components of the claim when it authorized treatment for them. Additionally, the evidentiary record shows that Mr. Rohrbaugh injured his back either while working on his property at home or as the result of increased activity at work. If the injury occurred while he was working on his property at home, there is no indication that cutting wood and clearing brush were not part of his ordinary activities given his condition. Ergon, Inc., argues before this Court that its constitutional rights were violated when the Office

of Judges refused its motion to expunge the reports of Drs. Ragoowansi and DiDomenico. We find that West Virginia Code of State Rules § 93-1-7.4D states that when a party fails to produce an expert for cross-examination, the Office of Judges may expunge their report from the record. The statute does not state that the Office of Judges must expunge the records, it merely provides that as an option. The Office of Judges was well within its statutory rights to refuse the motion to expunge.

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: May 7, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Allen H. Loughry II