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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

KENNETH BAKER,

Petitioner,

v.

**CENTRE FOUNDRY &
MACHINE COMPANY,**

Respondent.

Supreme Court No.: 17-0749
Appeal No.: 2051860
JCN: 2017001557
CCN: 55024969
DOI: 4/10/14

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**RESPONSE TO PETITION FOR APPEAL
ON BEHALF OF RESPONDENT,
CENTRE FOUNDRY & MACHINE COMPANY**

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NATURE OF PETITION FOR APPEAL

Petitioner, Kenneth Baker ("the claimant"), by counsel, has filed a petition for appeal from the Workers' Compensation Board of Review's order dated July 28, 2017, which affirmed the Decision of Administrative Law Judge dated February 14, 2017, which affirmed the following orders entered by Berkshire Hathaway Homestate Companies ("the carrier"): the order dated June 29, 2016, which rejected the claimant's application for benefits arising out of an alleged back injury, which had allegedly occurred on April 10, 2014; the second order dated June 29, 2016, which denied the claimant's reopening application; the order dated July 12, 2016, which denied a request for authorization for a referral to a neurosurgeon; and the order dated August 1, 2016, which denied a request for authorization for aqua therapy. Respondent, Centre Foundry & Machine Company ("the employer"), by counsel, requests this Honorable Court to affirm the Workers' Compensation Board of Review's order dated July 28, 2017, because the rulings rendered below are supported by West Virginia law and a preponderance of the evidence of record. The claimant's claim is time-barred

because the claimant did not complete an application for workers' compensation benefits until more than 23 months after his alleged, occupational back injury, and a health-care provider did not complete an application for workers' compensation benefits on the claimant's behalf until more than 26 months after the alleged injury. Moreover, the claimant did not seek or receive any medical attention for a back problem on or after April 10, 2014, until January 4, 2016. Finally, the claimant has a documented preexisting history of back problems, and has sustained a subsequent injury to his back since April 10, 2014.

STATEMENT OF THE CASE

Although he has been less than forthright about it, the claimant clearly had a history of back problems prior to his alleged, occupational back injury of April 10, 2014. The claimant testified that the only time that he had received treatment for a back problem prior to April 10, 2014, was in 1998 or 1999, when he was treated by Dr. Smith, a chiropractor, who has since died (see the transcript of the October 7, 2016, hearing at 6-7, 20, 24; Petitioner's Appendix, Exhibit J). Moreover, the claimant specifically denied having injured his lower back in an automobile accident in which he had been involved in January 2009 (TR. 21-24). In fact, the claimant denied, under oath, having complained of any lower-back pain during his visit to Ohio Valley Medical Center following the automobile accident of January 2009 (TR. 23-24). However, the employer, by counsel, has introduced into evidence, Ohio Valley Medical Center's records dated January 5, 2009, which contain references on the first and second pages to back pain and soreness, and establish on the fifth page the fact that the claimant had complained of "tenderness on right lower back" (see Respondent's Supplemental Appendix, Exhibit A).

The employer, by counsel, also has introduced into evidence, medical records

establishing that the claimant had experienced lower-back pain on multiple occasions spanning a period of several years prior to April 10, 2014. On Line No. 58 of the first page of Corporate Health Services' records dated June 26, 2006, the claimant indicated that he had experienced low-back pain or a slipped disc, and on the third page of such records reference is made to the claimant's history of "LBP" (i.e., lower-back pain) (see Respondent's Supplemental Appendix, Exhibit B). According to the first page of Corporate Health's records dated February 22, 2012, and March 18, 2014 (i.e., only 23 days prior to the claimant's alleged injury of April 10, 2014), the claimant also admitted to a history of a back injury or lower-back pain (see Respondent's Supplemental Appendix, Exhibits C & D). Further, Wheeling Hospital's chest x-ray report dated February 5, 2013, contains the following relevant finding: "There is stable moderate degenerative changes of the thoracic spine" (see Respondent's Supplemental Appendix, Exhibit E). Similarly, Wheeling Hospital's chest x-ray report dated March 18, 2014, indicates that the claimant has "diffuse idiopathic skeletal hyperostosis of the thoracic spine," which is a form of degenerative arthritis (see Respondent's Supplemental Appendix, Exhibit F).

The claimant, by counsel, has introduced into evidence, the "Supervisor's Accident Report" dated April 10, 2014, in which John Shafer, a foreman, states that the claimant had reported having injured his back while removing an electromagnet from a crane hook, but that there had been no witness to this alleged incident (see Petitioner's Appendix, Exhibit D). In addition, the claimant, by counsel, introduced into evidence, the "West Virginia Workers' Compensation Employer's Report of Injury" dated April 14, 2014, which indicates that the claimant had reported having sprained/strained his "back, lower or center unknown" on April 10, 2014, but not missed any work, due to this alleged injury (see Petitioner's Appendix, Exhibit E). The claimant, by counsel, also

introduced into evidence, the carrier's claim intake form, which indicates that the carrier had been informed of the claimant's alleged injury of April 10, 2014, on April 14, 2014 (see Petitioner's Appendix, Exhibit F). However, the evidentiary record herein does not contain a single document filled out or signed by the claimant or a medical provider on the claimant's behalf, which is dated prior to 2016.

The evidentiary record herein does not contain any medical evidence whatsoever dated from April 10, 2014, to January 3, 2016, and the claimant testified that he had not visited a doctor for any problem with his back in between April 10, 2014, and January 2016 (see the transcript of the October 7, 2016, hearing at 26; Petitioner's Appendix, Exhibit J). The claimant's alleged injury of April 10, 2014, was so insignificant that the claimant actually had forgotten about it until a BrickStreet representative mentioned it on April 1, 2016, or almost two years later (TR. 32).

The first medical evidence of record dated on or after April 10, 2014, is Dr. Robert J. Helfer's report dated January 4, 2016, which bears the claimant's signature (see Respondent's Supplemental Appendix, Exhibit G). Under the "CURRENT HISTORY" section of Dr. Helfer's report, the claimant was asked, among other things, if his condition was due to an accident at work, but the claimant, who complained of back pain going down his leg, did *not* indicate that his condition was due to a work-related accident (Id.).

The next medical evidence of record is Bentley Chiropractic's report dated January 22, 2016 (see Respondent's Supplemental Appendix, Exhibit H). This report indicates that the claimant had experienced right lower lumbar and leg pain for three months (i.e., since late-2015, not since April 10, 2014), and that the cause of the claimant's pain had been, "GRADUAL ONSET - NO TRAUMA" (Id.).

An MRI of the claimant's lumbar spine was taken at St. Clairsville Health Center at Dr. Craig Bentley's request on March 4, 2016. Dr. Gary Loh, a radiologist, stated that the claimant's clinical history was: "Back pain with right radiculopathy for three months." (Again, this record indicates that the claimant's back pain and leg symptoms had surfaced in late-2015, as opposed to on April 10, 2014.)

While he was taking apart a water hose connection at work on March 8, 2016, the claimant "suddenly doubled over in pain," according to the Witness Statement completed by John Shafer on March 8, 2016 (see Respondent's Supplemental Appendix, Exhibit I). The claimant testified that on March 8, 2016, or March 9, 2016, he had thrown 50-pound bags of chemicals into a furnace in an unusually short period of time, which had caused him to be almost unable to walk (see the transcript of the October 7, 2016, hearing at 12-13, 30; Petitioner's Appendix, Exhibit J). Following this injury, the claimant's supervisor, Frank VanSickle, contacted BrickStreet Mutual Insurance Company ("BrickStreet") to file a claim, which was assigned Claim No. 2016003709 (see BrickStreet's First Report of Injury dated March 8, 2016; Respondent's Supplemental Appendix, Exhibit J). Instead of processing the claimant's claim in compliance with W.Va. Code § 23-5-1(b)(2)(a) (2009), however, BrickStreet directed the claimant to seek payment from the carrier herein simply because the claimant allegedly had injured his lower back at work almost two years earlier (see the transcript of the October 7, 2016, hearing at 14, 31-32; Petitioner's Appendix, Exhibit J).

On March 26, 2016, for the first time, the claimant filled out the top half of, and signed, an Employees' and Physicians' Report of Occupational Injury or Disease (WC-1), in which he stated that he had injured his back at work on April 10, 2014 (see Petitioner's Appendix, Exhibit H). However, the "Initial Healthcare Provider" section of the claimant's Employees' and Physicians'

Report of Occupational Injury or Disease (WC-1) dated March 26, 2016, was not filled out or signed by a physician or other health care provider.

Undeterred by BrickStreet's unwillingness to process a "claim," and obviously believing that the claimant had sustained an injury on March 8, 2016, claimant's counsel submitted a "Petition Alleging Employer or its Claim Administrator Has Failed to Timely Act" against BrickStreet to the Workers' Compensation Office of Judges ("the Office of Judges") in Claim No. 2016023367 on May 12, 2016 (see Respondent's Supplemental Appendix, Exhibit K). By order dated May 31, 2016, the Office of Judges denied the claimant's petition filed in Claim No. 2016023367 for the following reasons: "Upon review of the claimant's Petition, the only documentation provided was the March 8, 2016, Employer's Report of Injury. No Employee's Report of Occupational Injury or Disease, or WC-1, was provided. Accordingly, it is ORDERED that the May 12, 2016, Petition Alleging Failure to Timely Act is DENIED" (see Respondent's Supplemental Appendix, Exhibit L). In other words, the Office of Judges found that the claimant's timely filing of an Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) was a prerequisite to the carrier's duty to render a compensability ruling.

Instead of filing an Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) in Claim No. 2016023367, however, the claimant, by counsel, filed a completed Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) dated June 13, 2016, in the instant claim, more than two years after the alleged injury of April 10, 2014 (see Petitioner's Appendix, Exhibit I). Dr. Bentley completed the "Initial Healthcare Provider" section of the claimant's Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) dated June 13, 2016, and stated therein that the claimant had not sought medical attention for his alleged injury

of April 10, 2014, until February 15, 2016, or more than 22 months later (Id.). This is the first injury report completed or signed by a physician on the claimant's behalf.

According to Dr. Bentley's report dated June 15, 2016, the claimant told Dr. Bentley that he had injured his lower back at work on April 10, 2014, experienced a "severe re-aggravation on March 10, 2016," and had a "previous episode of lower lumbar pain approximately 15 years ago," but apparently did not disclose to Dr. Bentley, any information about the lower-back injury that he had sustained in the automobile accident of January 5, 2009, the lower-back problems that he had experienced after the automobile accident, or the moderate degenerative changes of the thoracic spine and other degenerative condition detected by the x-rays taken of his chest on February 5, 2013, and March 18, 2014 (i.e., only 23 days prior to the claimant's alleged injury of April 10, 2014).

Dr. Bentley also signed a "Claim Reopening Application for Temporary Total Disability/Wage Replacement or Medical Treatment Benefits" on the claimant's behalf on June 15, 2016 (see Respondent's Supplemental Appendix, Exhibit M). Interestingly, Dr. Bentley stated on Line No. 7 of the "Claim Reopening Application for Temporary Total Disability/Wage Replacement or Medical Treatment Benefits" that the claimant had *not* sustained an aggravation or progression of the claimant's disability since having been released to resume employment or having reached a maximum degree of medical improvement (Id.).

By protestable order dated June 29, 2016, the carrier rejected the claimant's application for workers' compensation benefits dated June 13, 2016, on the following grounds: "After careful consideration of all available information, we have concluded that we are unable to accept your claim pursuant to W.Va. Code Section 23-4-15(a), as you did not file the application for workers' compensation benefits within six (6) months of the date of your alleged injury of 4/10/14.

Furthermore, there was no treatment sought for over a year and a half following the 4/10/14 incident" (see Petitioner's Appendix, Exhibit A). The claimant, by counsel, protested the carrier's rejection decision.

In a second order dated June 29, 2016, the carrier denied the claimant's reopening application because the claimant's application for benefits had been untimely filed, pursuant to W.Va. Code § 23-4-15(a) (2010) (see Petitioner's Appendix, Exhibit A). The claimant, by counsel, protested the carrier's second order dated June 29, 2016, as well.

By order dated July 12, 2016, the carrier denied claimant's counsel's request to authorize a referral of the claimant to a neurosurgeon (see Petitioner's Appendix, Exhibit A). The claimant, by counsel, protested the carrier's order dated July 12, 2016.

In a letter dated August 1, 2016, the carrier denied claimant's counsel's request to authorize aqua therapy because the instant claim had been rejected (see Petitioner's Appendix, Exhibit A). Although the carrier's document dated August 1, 2016, is a letter, as opposed to a protestable decision, the claimant, by counsel, protested the letter, and the Office of Judges acknowledged the protest.

By Decision of Administrative Law Judge dated February 14, 2017, the Honorable Martha Hill affirmed the carrier's two orders dated June 29, 2016, the order dated July 12, 2016, and the order dated August 1, 2016 (see Petitioner's Appendix, Exhibit B). Judge Hill ruled that the claimant had not timely filed an application for workers' compensation benefits, which meant that the claimant was not entitled to any medical or disability benefits in this claim. The claimant, by counsel, filed an appeal from the Decision of Administrative Law Judge dated February 14, 2017.

By order dated July 28, 2017, the Workers' Compensation Board of Review ("the

Board") affirmed the Decision of Administrative Law Judge dated February 14, 2017, which affirmed the carrier's two orders dated June 29, 2016, the order dated July 12, 2016, and the order dated August 1, 2016 (see Petitioner's Appendix, Exhibit C). The Grounds for the Board's order were, as follows: "The Board agrees that the claim was properly rejected because the claimant failed to timely seek medical treatment; however, the Board does not adopt the discussion and conclusion regarding the timeliness of filing the claim application" (Id.). The claimant, by counsel, has filed a petition for appeal from the Board's order dated July 28, 2017.

SUMMARY OF ARGUMENT

The Board's order dated July 28, 2017, should be affirmed because it correctly affirms the valid Decision of Administrative Law Judge dated February 14, 2017. The grounds for the Board's order affirming the Office of Judges' decision, which are that the claimant's claim has been properly rejected, due to the claimant's failure to timely seek medical treatment, are valid. Moreover, the carrier and the Office of Judges have correctly ruled that the claimant's claim has been untimely filed, and, therefore, the claimant is not entitled to workers' compensation benefits. Finally, even if he had timely filed his claim and promptly sought medical attention, the claimant would not be entitled to workers' compensation benefits herein, anyway, as he has failed to establish that his need for medical care beginning in 2016, is attributable to his alleged injury of April 10, 2014, and not due to his preexisting condition or subsequent back injury.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Employer's counsel does not believe that oral argument is necessary in the instant claim.

ARGUMENT

Because all of the decision-makers below have ruled that the claimant is not entitled to workers' compensation benefits herein, the standard of review applicable to this Honorable Court herein is as follows: "If the decision of the board represents an affirmation of a prior ruling by both the [carrier] and the office of judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the supreme court of appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de-novo reweighing of the evidentiary record." W.Va. Code § 23-5-15(c) (2005). The Board's order dated July 28, 2017, is not violative of the Constitution or the West Virginia Workers' Compensation Act, does not result from erroneous conclusions of law, and is not based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Accordingly, the Board's order dated July 28, 2017, should be affirmed.

There was no legitimate reason for the Board to reverse or modify the Decision of Administrative Law Judge dated February 14, 2017. The standard of review applicable to the Board is as follows: The Board shall reverse, vacate or modify a decision of an administrative law judge if the substantial rights of the appellant have been prejudiced because the Administrative Law Judge's findings are: (1) In violation of statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the Administrative Law Judge; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse

of discretion or clearly unwarranted exercise of discretion. W.Va. Code § 23-5-12(b) (2006). Further, the resolution of the issues herein shall be based upon a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. W.Va. Code § 23-4-1g(a) (2003). The Decision of Administrative Law Judge dated February 14, 2017, does not prejudice the claimant's substantial rights, as it is consistent with applicable law, and supported by a preponderance of the evidence of record.

THIS HONORABLE COURT SHOULD AFFIRM THE BOARD'S ORDER DATED JULY 28, 2017, BECAUSE THE CLAIMANT'S APPLICATION FOR BENEFITS HAS BEEN UNTIMELY FILED, THE CLAIMANT HAS NOT PROMPTLY SOUGHT MEDICAL ATTENTION FOR HIS ALLEGED INJURY, AND THE CLAIMANT HAS INJURED HIS BACK BEFORE AND AFTER APRIL 10, 2014.

Although the Board did not base its order upon this reason, the Board's order dated July 28, 2017, which affirmed the Decision of Administrative Law Judge dated February 14, 2017, should be affirmed because the claimant has not filed his application for workers' compensation benefits within six months of the date of the alleged injury of April 10, 2014. "To entitle any employee...to compensation under this chapter...the application for compensation shall be made on the form or forms prescribed by the Insurance Commissioner, and filed with the...private carrier...within six months from and after the injury...and unless filed within the six months period,

the right to compensation under this chapter is forever barred, such time limitation being hereby declared to be a condition of the right and hence jurisdictional...." W.Va. Code § 23-4-15(a) (2010). The dates of the claimant's Employees' and Physicians' Reports of Occupational Injury or Disease (WC-1) are March 26, 2016, and June 13, 2016. In his section of each of his Employees' and Physicians' Reports of Occupational Injury or Disease (WC-1), the claimant identifies his date of injury as April 10, 2014, or far longer than six months prior to the date of either of his injury reports. Therefore, the claimant's application for workers' compensation benefits is barred by W.Va. Code § 23-4-15(a) (2010), and the Decision of Administrative Law Judge dated February 14, 2017, should have been affirmed for this reason alone.

The second reason that the Decision of Administrative Law Judge dated February 14, 2017, should have been affirmed, and the reason that the Board did so affirm such decision, is that the claimant did not immediately seek medical attention after his alleged injury of April 10, 2014. "Immediately after sustaining an occupational injury, a claimant should 1) seek necessary medical care; 2) immediately on the occurrence of the injury or as soon thereafter as practicable give or cause to be given to the employer or any of the employer's agents a written notice of the occurrence of the injury; and 3) file a workers' compensation claim or request that one be filed on his or her behalf. Failure to immediately give notice to the employer of the injury weighs against a finding of compensability in the weighing of evidence mandated by W. Va. Code § 23-4-1g and dilutes the credibility and reliability of the claim. Notice provided to the employer within two (2) working days of the injury shall be deemed immediate notice...." W.Va. C.S.R. § 85-1-3.1 (2009). The Initial Healthcare Provider's section of the claimant's Employees' and Physicians' Report of Injury (WC-1) dated March 26, 2016, has been left blank. According to the Initial Healthcare Provider's section

of the claimant's Employees' and Physicians' Report of Injury (WC-1) dated June 13, 2016, the claimant did not seek medical attention for his alleged injury of April 10, 2014, until February 15, 2016, or more than 22 months later. Moreover, the record herein does not contain any medical evidence whatsoever dated from April 10, 2014, to January 3, 2016, and the claimant testified that he had not visited a doctor for any problem with his back between April 10, 2014, and January 2016. In other words, it is beyond dispute that the claimant did not immediately seek medical care following his alleged, lower-back injury of April 10, 2014, as was required by W.Va. C.S.R. § 85-1-3.1 (2009).

In further violation of W.Va. C.S.R. § 85-1-3.1 (2009), the claimant did not immediately notify the employer in writing of his alleged injury of April 10, 2014. The claimant, by counsel, has introduced into evidence documents entitled, "Supervisor's Accident Report"dated April 10, 2014, and "West Virginia Workers' Compensation Employer's Report of Injury" dated April 14, 2014, but both of these reports have been filled out by the employer, not the claimant. Therefore, the claimant did not immediately notify the employer *in writing* of his alleged injury of April 10, 2014, as he was required to do by W.Va. C.S.R. § 85-1-3.1 (2009).

It also should be noted that neither the "Supervisor's Accident Report"dated April 10, 2014, nor the "West Virginia Workers' Compensation Employer's Report of Injury" dated April 14, 2014, is a sufficient substitute for an application for compensation made on a form prescribed by the Insurance Commissioner, which is required to be filed by the claimant by W.Va. Code § 23-4-15(a) (2010). *See, Wedger v. The Homer Laughlin China Company*, No. 13-1149 (W.Va. Supreme Court of Appeals, January 20, 2015) (Memorandum Decision). The most important difference between the "Supervisor's Accident Report"dated April 10, 2014, as well as the "West Virginia

Workers' Compensation Employer's Report of Injury" dated April 14, 2014, and an Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) is that neither the "Supervisor's Accident Report"dated April 10, 2014, nor the "West Virginia Workers' Compensation Employer's Report of Injury" dated April 14, 2014, contains a medical provider's section. The Office of Judges previously ruled in a decision affirmed by both the Board and this Honorable Court that where a physician had not completed the Employees' and Physicians' Report of Occupational Injury until more than six months after the date of the claimant's alleged injury, the claimant's claim was untimely filed and barred by W.Va. Code § 23-4-15(a) (2010), notwithstanding the fact that the claimant had immediately reported his alleged injury to his supervisor. *Ward v. M & G Polymers USA, LLC*, No. 12-0738 (W.Va. Supreme Court of Appeals, January 14, 2014) (Memorandum Decision). A physician did not complete an Employees' and Physicians' Report of Occupational Injury or Disease on the claimant's behalf until June 13, 2016, or more than two years after the claimant's alleged injury of April 10, 2014. Therefore, the instant claim is barred by W.Va. Code § 23-4-15(a) (2010), pursuant to *Ward v. M & G Polymers USA, LLC*, No. 12-0738 (W.Va. Supreme Court of Appeals, January 14, 2014) (Memorandum Decision). *See also, Iftikhar H. Saiyed v. 3 S Network, Inc.* No. 15-0864 (W.Va. Supreme Court of Appeals, August 26, 2016) (Memorandum Decision); *Wedger v. The Homer Laughlin China Company*, No. 13-1149 (W.Va. Supreme Court of Appeals, January 20, 2015) (Memorandum Decision).

In the unlikely event that this Honorable Court were to rule that the claimant has timely filed a claim arising out of the alleged injury of April 10, 2014, and promptly sought medical attention therefor, the employer, by counsel, has developed substantial, reliable, and probative evidence to establish that the claimant's lower-back problems in 2016, are due to a preexisting,

lower-back condition, and a subsequent, lower-back injury, as opposed to the alleged injury of April 10, 2014. The claimant's testimony as to the lower-back problems that the claimant had experienced prior to April 10, 2014, is far from credible. The claimant testified that the only time that he had received treatment for a back problem prior to April 10, 2014, was in 1998 or 1999, when he was treated by Dr. Smith, a chiropractor who has since died. Moreover, the claimant specifically denied having injured his lower back in the automobile accident in which he had been involved in January 2009. In fact, the claimant denied under oath having mentioned any lower-back pain during his visit to Ohio Valley Medical Center following the automobile accident of January 2009. However, the employer, by counsel, has introduced into evidence, Ohio Valley Medical Center's records dated January 5, 2009, which contain references to back pain and soreness, as well as the fact that the claimant had complained of "tenderness on right lower back."

The employer, by counsel, also has introduced into evidence, medical records establishing that the claimant had experienced back problems on multiple occasions for more than seven years prior to April 10, 2014. Corporate Health Services' records dated June 26, 2006, establish that the claimant indicated that he had experienced low-back pain or a slipped disc, and reference is made therein to the claimant's history of "LBP" (i.e., lower-back pain). According to Corporate Health's records dated February 22, 2012, and March 18, 2014 (i.e., only 23 days prior to the claimant's alleged injury of April 10, 2014), the claimant also admitted to a history of a back injury or lower-back pain. Further, Wheeling Hospital's chest x-ray report dated February 5, 2013, contains the following relevant finding: "There is stable moderate degenerative changes of the thoracic spine." Similarly, Wheeling Hospital's chest x-ray report dated March 18, 2014, indicates that the claimant has "diffuse idiopathic skeletal hyperostosis of the thoracic spine," which is a form

of degenerative arthritis.

Although the claimant, through his attorney, is now attempting to attribute his current lower-back problems to an alleged lifting injury at work on April 10, 2014, neither the claimant's actions on and after April 10, 2014, nor the evidence of record suggests a causal connection between the claimant's symptoms in 2016, and alleged injury of April 10, 2014. "In determining whether an injury resulted from claimant's employment, a causal connection between the injury and employment must be shown to have existed." Syl. Pt. 3, *Emmel v. State Comp. Dir.*, 150 W.Va. 277, 145 S.E.2d 29 (1965). The claimant allegedly injured his lower back on April 10, 2014, at 6:30 a.m., but completed his shift that day, which did not end until 6:00 p.m. (see the transcript of the October 7, 2016, hearing at 24; Petitioner's Appendix, Exhibit J). Moreover, the claimant worked six days per week, twelve hours per day, after April 10, 2014, until March 9, 2016, or March 10, 2016 (TR. 9-10, 18 and 25). In fact, the claimant admitted that his alleged, lower-back injury of April 10, 2014, had "healed up" over the weekend following April 10, 2014 (TR. 9, 26-27). The claimant's alleged injury of April 10, 2014, was so insignificant that the claimant did not seek any medical care for a back problem on or after April 10, 2014, until January 2016, and the claimant actually had forgotten about it until a BrickStreet representative mentioned it on April 1, 2016, or almost two years later (TR. 26 & 32).

The first medical evidence of record dated on or after April 10, 2014, is Dr. Helfer's report dated January 4, 2016, which bears the claimant's signature. Under the "CURRENT HISTORY" section of Dr. Helfer's report, the claimant was asked, among other things, if his condition was due to an accident at work, but the claimant, who complained of back pain going down his leg, did *not* indicate that his condition was due to a work-related accident.

The next medical evidence of record is Bentley Chiropractic's report dated January 22, 2016. This report indicates that the claimant had experienced right lower lumbar and leg pain for three months (i.e., since late-2015, not since April 10, 2014), and that the cause of the claimant's pain had been, "GRADUAL ONSET - NO TRAUMA." In other words, in neither of the earliest chiropractic records is the claimant's alleged injury of April 10, 2014, referenced.

While he was taking apart a water hose connection at work on March 8, 2016, the claimant "suddenly doubled over in pain," according to the Witness Statement completed by Mr. Shafer, a foreman, on March 8, 2016. The claimant testified that on March 8, 2016, or March 9, 2016, he had thrown 50-pound bags of chemicals into a furnace in an unusually short period of time, which had caused him to be almost been unable to walk (see the transcript of the October 7, 2016, hearing at 12-13, 30; Petitioner's Appendix, Exhibit J). Following this injury, the claimant's supervisor, Mr. VanSickle, contacted BrickStreet to file a claim, which was assigned Claim No. 2016003709. Instead of processing the claimant's claim in compliance with W.Va. Code § 23-5-1(b)(2)(a) (2009), however, BrickStreet directed the claimant to seek payment from the carrier herein simply because the claimant allegedly had injured his lower back at work almost two years earlier (see the transcript of the October 7, 2016, hearing at 14, 31-32; Petitioner's Appendix, Exhibit J). Undeterred and obviously believing that the claimant had sustained an injury on March 8, 2016, claimant's counsel submitted a "Petition Alleging Employer or its Claim Administrator Has Failed to Timely Act" against BrickStreet to the Office of Judges in Claim No. 2016023367 on May 12, 2016. By order dated May 31, 2016, the Office of Judges denied the claimant's petition filed in Claim No. 2016023367 for the following reasons: "Upon review of the claimant's Petition, the only documentation provided was the March 8, 2016, Employer's Report of Injury. No Employee's

Report of Occupational Injury or Disease, or WC-1, was provided. Accordingly, it is ORDERED that the May 12, 2016, Petition Alleging Failure to Timely Act is DENIED." The Office of Judges' order dated May 12, 2016, is consistent with the crux of the employer's primary contention herein, which is that the claimant's timely filing of an Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) is a prerequisite to a finding of compensability.

Instead of filing an Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) in Claim No. 2016023367, the claimant, by counsel, filed a completed Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) dated June 13, 2016, in the instant claim, more than two years after the alleged injury of April 10, 2014. The claimant's injury of March 8, 2016, constitutes an "independent intervening cause" of the claimant's lower-back problems, which "cannot be related back" to the claimant's alleged lower-back injury of April 10, 2014. *See, Wilson v. Workers' Comp. Com'r*, 174 W.Va. 611, 328 S.E.2d 485 (1984). Therefore, the carrier herein would not be liable for any benefits herein, even if the claimant had filed a timely claim, and promptly received medical attention.

For all of the reasons discussed above, the Board's order dated July 28, 2017, which affirmed the Decision of Administrative Law Judge dated February 14, 2017, which affirmed the carrier's two orders dated June 29, 2016, order dated July 12, 2016, and order dated August 1, 2016, should be affirmed. Even if this claim were ruled compensable, the order entered below, to the extent that it affirmed the decision affirming the carrier's second order dated June 29, 2016, which denied the claimant's reopening application, would be worthy of affirmance because the claimant has applied for, and received, Social Security *retirement* benefits (see the transcript of the October 7, 2016, hearing at 36; Petitioner's Appendix, Exhibit J), which disqualifies the claimant from

receiving temporary total disability benefits, pursuant to W.Va. C.S.R. § 85-1-5.2 (2009). In addition, the claimant failed to establish an entitlement to a reopening for temporary total disability benefits, pursuant to W.Va. Code § 23-5-3 (2009), as Dr. Bentley stated on Line No. 7 of the "Claim Reopening Application for Temporary Total Disability/Wage Replacement or Medical Treatment Benefits" that the claimant had *not* sustained an aggravation or progression of the claimant's disability since having been released to resume employment or having reached a maximum degree of medical improvement. Finally, the Board's affirmance of the Decision of Administrative Law Judge dated February 14, 2017, to the extent that such decision affirmed the carrier's order dated August 1, 2016, which denied claimant's counsel's request for authorization of aqua therapy, is worthy of affirmance because such treatment has not been recommended to the claimant (see the transcript of the October 7, 2016, hearing at 18; Petitioner's Appendix, Exhibit J), and, therefore, is neither reasonable nor required, pursuant to W.Va. Code § 23-4-3(a)(1) (2005).

CONCLUSION

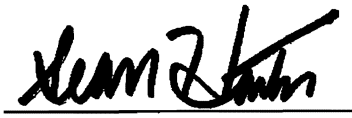
The claimant's application for workers' compensation benefits has been untimely filed, and is barred by W.Va. Code § 23-4-15(a) (2010). Moreover, the claimant, who did not receive any medical care or treatment for his alleged back injury of April 10, 2014, until almost two years later, has failed to establish that his back condition in 2016, is due to his alleged injury of April 10, 2014, as opposed to his pre-existing back condition and/or subsequent back injury of March 8, 2016. For these reasons, the Board's order dated July 28, 2017, which affirmed the Decision of Administrative Law Judge dated February 14, 2017, which affirmed the carrier's two orders dated June 29, 2016, which rejected the claimant's application for benefits, and denied the claimant's reopening application, the order dated July 12, 2016, which denied a request for authorization for

a referral to a neurosurgeon, and the order dated August 1, 2016, which denied a request for authorization for aqua therapy, should be affirmed.

Respectfully submitted,

CENTRE FOUNDRY & MACHINE COMPANY

By Counsel



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

KENNETH BAKER,

Petitioner,

v.

CENTRE FOUNDRY & MACHINE COMPANY,

Respondent.

Supreme Court No.: 17-0749
Appeal No.: 2051860
JCN: 2017001557
CCN: 55024969
DOI: 4/10/14

CERTIFICATE OF SERVICE

I, Sean Harter, do hereby certify that a true copy of the foregoing,"Response to Petition for Appeal on Behalf of Respondent, Centre Foundry & Machine Company," and "Respondent's Supplemental Appendix of Exhibits" were sent this 13th day of September, 2017, first class U.S. mail, postage prepaid, to the following:

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