

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**Jess Shaffer,  
Claimant Below, Petitioner**

**vs.) No. 21-0662** (BOR Appeal No. 2056270)  
(Claim No. 2016026218)

**West Virginia University,  
Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Jess Shaffer appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). West Virginia University filed a timely response.<sup>1</sup> The issue on appeal is an additional compensable condition. The claims administrator denied the addition of intervertebral disc disorder to the claim on January 8, 2020. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the decision in its January 7, 2021, Order. The Order was affirmed by the Board of Review on July 22, 2021. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the Board of Review's decision is appropriate. *See* W. Va. R. App. P. 21.

Mr. Shaffer, a trade specialist lead, injured his shoulders and lower back in the course of his employment on January 26, 2016, when he tripped while carrying a fan shroud and blade. The physician's section of the Employees' and Physicians' Report of Injury was completed by James Bailey, M.D., on April 18, 2016, and indicates diagnoses of occupational lower back and bilateral shoulder injuries.

Mr. Shaffer has a history of lower back issues. On November 7, 2003, he sought treatment at Uniontown Hospital for right shoulder pain that started after he accidentally pulled down a piece of equipment on himself. X-rays of the lumbar spine showed degenerative changes, mostly at L4-5 and L5-S1. Mr. Shaffer was diagnosed with right shoulder strain, right trapezius strain, lumbosacral strain, and right ankle strain. Treatment notes from November 12, 2003, through November 25, 2003, by J. Netaji, M.D., indicate Mr. Shaffer was treated for bilateral shoulder and

---

<sup>1</sup>Mr. Shaffer is represented by William C. Gallagher, and West Virginia University is represented by H. Dill Battle III.

lower back injuries. He reported pain that radiated into his legs, as well as numbness. Right shoulder range of motion was limited. Mr. Shaffer was diagnosed with shoulder and low back pain.

A lumbar MRI, performed on December 3, 2003, showed cord compression due to a herniated T11-12 disc. It also showed moderately severe degenerative spondylosis superimposed on a congenitally small spinal canal causing multilevel spinal stenosis. On December 5, 2003, Mr. Shaffer returned to Dr. Netaji for low back pain, right thigh pain, and a patch of numbness in the left thigh. The assessments were T11-12 cord compression and disc herniation.

Mr. Shaffer sought treatment from Sanford Emery, M.D., on December 31, 2003, for low back pain and left lower extremity numbness. A review of Mr. Shaffer's MRI showed L4-5 and L5-S1 disc degeneration, mild lumbar scoliosis due to degenerative changes, and a T11-12 disc herniation. Dr. Emery opined that Mr. Shaffer's prior work-related injury caused a lumbar sprain superimposed on degenerative changes. On March 22, 2004, Dr. Netaji diagnosed degenerative disc disease, lumbar stenosis, and T11-12 disc herniation. On January 25, 2005, the diagnosis was acute on chronic lumbar strain. Mr. Shaffer underwent a thoracic MRI on March 14, 2005, which revealed an extruding T11-12 disc, moderate to severe central stenosis, mild to moderate right foraminal stenosis with moderate compression of the distal thoracic spinal cord, and moderate degenerative disc disease.

Following the January 26, 2016, compensable injury at issue, Mr. Shaffer returned to Dr. Bailey. In his April 8, 2016, treatment note, Dr. Bailey stated that Mr. Shaffer had sustained several work-related injuries, the last of which occurred in 2003. Mr. Shaffer complained of moderate to severe low back pain but had no numbness or weakness. Dr. Bailey diagnosed lumbago due to intervertebral disc displacement. On April 18, 2016, Mr. Shaffer returned and reported low back and shoulder issues after tripping and falling at work on January 26, 2016. Dr. Bailey noted that Mr. Shaffer did not seek treatment between January 16, 2016, and April 8, 2016, and that he was not made aware of a January 26, 2016, work-related injury when he treated Mr. Shaffer on April 8, 2016. Mr. Shaffer reported to Dr. Bailey that his low back pain had worsened over time and now radiated into both legs. Examination of Mr. Shaffer's low back and legs showed no abnormal findings. Dr. Bailey diagnosed lumbar and bilateral shoulder sprains.

On August 4, 2016, the Office of Judges reversed the claims administrator's April 25, 2016, rejection of the claim and held the claim compensable for lumbar and bilateral shoulder sprains. Mr. Shaffer underwent a lumbar MRI on August 23, 2016, which showed dextroscoliosis with advanced degenerative disc disease, facet arthropathy, severe stenosis from T11-L4, and spinal cord myelomalacia at T11-12.

In a September 27, 2016, orthopedic evaluation, Scott Daffner, M.D., noted that Mr. Shaffer had significantly improved since the compensable injury. He reported a prior low back injury in 2003, which caused a T11-12 disc herniation. Dr. Daffner diagnosed degenerative lumbar spinal stenosis with a recent exacerbation due to injury, and thoracic disc herniation with stenosis. On October 12, 2016, Mr. Shaffer returned to Dr. Bailey who diagnosed lumbago due to a displaced disc, lumbar sprain, bilateral shoulder sprains, and complete bilateral rotator cuff tears.

On November 9, 2016, Dr. Bailey noted that Mr. Shaffer's right shoulder had greatly improved but he continued to have significant issues with his left shoulder and low back.

In a November 18, 2016, Independent Medical Evaluation, Scott Rainey, M.D., noted that Mr. Shaffer injured his lower back, knees, and shoulders on January 26, 2016, when he fell at work. At the time of evaluation, Mr. Shaffer reported severe pain in his right buttock that radiated into both legs. He denied any prior work-related lower back injuries. Dr. Rainey found on examination that Mr. Shaffer had no specific areas of tenderness in the lower back. There was no objective evidence of sensory or motor deficits in the legs. Dr. Rainey opined that the January work injury resulted in a lumbar sprain, for which Mr. Shaffer had reached maximum medical improvement. He further opined that Mr. Shaffer could return to work with no restrictions. Dr. Rainey found that the ongoing back and leg pain was unrelated to the compensable injury. Mr. Shaffer's symptoms were found to be the result of severe, preexisting degenerative changes. Further, he had a prior work-related lower back injury, and imaging studies performed in 2003 showed significant degenerative changes and a disc herniation. Dr. Rainey assessed 8% whole person impairment for the lumbar spine but apportioned the entire amount to preexisting degenerative changes.

In a December 22, 2016, letter, Dr. Bailey stated that he had treated Mr. Shaffer for the compensable injury since April of 2016. His condition greatly improved following physical therapy but declined again when he returned to work. Dr. Bailey recommended Mr. Shaffer cease working and return to physical therapy. In a November 14, 2018, office note, Dr. Bailey stated that Mr. Shaffer had not been evaluated for some time. He continued to have significant shoulder, low back, and buttock pain. Dr. Bailey diagnosed chronic bilateral low back pain with sciatica. Mr. Shaffer continued to treat with Dr. Bailey for his low back and shoulder pain, and on October 24, 2019, Dr. Bailey requested the addition of intervertebral disc disorder to the claim. The only clinical finding noted in support was low back pain.

Rebecca Thaxton, M.D., performed a Physician Review on November 5, 2019, in which she opined that intervertebral disc disorder should not be added to the claim. In a November 8, 2019, notice of secondary conditions, the claims administrator indicated the claim was compensable for lumbar sprain, left shoulder sprain, right shoulder sprain, right shoulder rotator cuff tear, and left shoulder rotator cuff tear. The claims administrator denied the request to add intervertebral disc disorder to the claim on January 8, 2020.

Dr. Bailey testified in a deposition on March 19, 2020, that he has treated Mr. Shaffer for the compensable injury since April of 2016. He stated that Mr. Shaffer's August 23, 2016, MRI showed dextroscoliosis, which is a genetic condition. It also showed spinal canal stenosis and spinal cord myelomalacia, which can be caused by a traumatic injury. Dr. Bailey asserted that the lumbar MRI showing spinal canal stenosis justified his request to add intervertebral disc disorder to the claim. However, he also stated that there was no specific evidence of an acute injury on the MRI. Dr. Bailey testified that Mr. Shaffer initially began to improve, but following a lapse in treatment, his condition worsened. He opined that Mr. Shaffer's intervertebral disc disorder was a direct result of his compensable injury. Dr. Bailey admitted that he had not reviewed Mr. Shaffer's December 3, 2003, MRI. On July 29, 2020, Mr. Shaffer returned to Dr. Bailey and reported

continued significant limitations in his ability to work and function. The diagnoses were bilateral traumatic rotator cuff tears, chronic bilateral low back pain with sciatica, and bilateral hip pain.

The Office of Judges affirmed the claims administrator's denial of a request to add intervertebral disc disorder to the claim in its January 7, 2021, Order. It found that the record contains both pre and post-injury MRIs of the lumbar spine. Comparison of the two diagnostic studies shows that Mr. Shaffer did not suffer a lumbar disc injury as a result of the compensable injury. All findings seen on the August 23, 2016, post-injury MRI were also present on the pre-injury MRI. The Office of Judges noted that Dr. Bailey, Mr. Shaffer's treating physician who requested the addition of intervertebral disc disorder to the claim, did not review the December 2, 2003, pre-injury MRI. Because the MRIs show no change in Mr. Shaffer's lumbar spine, the Office of Judges concluded that Dr. Bailey's opinion was unreliable.

The Office of Judges determined that Drs. Daffner, Rainey, and Thaxton all opined that Mr. Shaffer's lumbar disc pathology preexisted the compensable injury. Dr. Daffner performed an orthopedic evaluation and diagnosed degenerative lumbar spinal stenosis exacerbated by the compensable injury. Dr. Rainey opined that Mr. Shaffer suffered a simple lumbar spine sprain and that his current symptoms were the result of severe preexisting degenerative changes, stenosis, and a T11-12 disc herniation. Dr. Thaxton performed a physician review and also concluded that Mr. Shaffer's lumbar disc disorder should not be added to the claim. The Office of Judges found their opinions to be supported by the diagnostic evidence of record.

Lastly, the Office of Judges found that the record clearly shows Mr. Shaffer's preexisting lower back conditions were significantly symptomatic prior to the compensable injury. It noted that Mr. Shaffer was treated from November 2003 through March of 2005 for low back pain with radicular symptoms. It concluded that though the compensable injury may have exacerbated or aggravated the preexisting condition, such aggravation did not result in a discrete new injury per *See Gill v. City of Charleston*, 236 W. Va. 737, 783 S.E.2d 857 (2016). The Board of Review affirmed the Office of Judges' Order on July 22, 2021.

This Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the Board of Review, and when the Board's decision affirms prior rulings by both the Workers' Compensation Commission and the Office of Judges, we may reverse or modify that decision only if it is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is based upon a material misstatement or mischaracterization of the evidentiary record. *See* W. Va. Code § 23-5-15(c) & (d). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. of Ins. Comm'r*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

The standard for the addition of a condition to a claim is the same as for compensability. For an injury to be compensable it must be a personal injury that was received in the course of employment, and it must have resulted from that employment. *Barnett v. State Workmen's Comp. Comm'r*, 153 W. Va. 796, 172 S.E.2d 698 (1970).

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. The claimant underwent MRIs before and after the injury, and comparison of the diagnostic images show no change. Dr. Bailey, who requested the addition of intervertebral disc disorder to the claim, did not review the pre-injury MRI and therefore, his opinion is unreliable. Further, Drs. Daffner, Rainey, and Thaxton all opined that Mr. Shaffer's lumbar disc pathology preexisted the compensable injury. A preponderance of the evidence clearly shows that Mr. Shaffer did not develop intervertebral disc disorder as a result of his compensable injury. We therefore affirm the decision of the Board of Review.

Affirmed.

**ISSUED: June 13, 2023**

**CONCURRED IN BY:**

Chief Justice Elizabeth D. Walker  
Justice Tim Armstead  
Justice John A. Hutchison  
Justice William R. Wooton  
Justice C. Haley Bunn