

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Asplundh Tree Expert Company,
Employer Below, Petitioner

vs.) No. 21-0786 (BOR Appeal No. 2056682)
(Claim No. 2021005540)

Jerry Cottrill,
Claimant Below, Respondent

MEMORANDUM DECISION

Petitioner Asplundh Tree Expert Company (“Asplundh”) appeals the decision of the West Virginia Workers’ Compensation Board of Review (“Board of Review”). Respondent Jerry Cottrill filed a timely response.¹ The issue on appeal is compensability. The claims administrator rejected the claim on October 12, 2020. The Workers’ Compensation Office of Judges (“Office of Judges”) reversed the decision in its April 26, 2021, Order and held the claim compensable for lumbar sprain/strain. The Order was affirmed by the Board of Review on September 17, 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. Cottrill alleges that he suffered from a low back injury when he slipped in gravel and jerked his back on June 4, 2020, during the course of his employment. The Employees’ and Physicians’ Report of Injury was completed on September 17, 2020. The physician’s section was completed by Perry Hall, M.D., who diagnosed an occupational back injury and noted that he first examined Mr. Cottrill for the injury on June 8, 2020. The claims administrator rejected the claim on October 12, 2020, because Mr. Cottrill initially reported to his supervisor that he was injured at home, there were no witnesses to the alleged injury, Mr. Cottrill waited three months to file his claim, and he had been out of work on the Family Medical Leave Act (“FMLA”) since June 5, 2020.

Mr. Cottrill had prior low back issues. On September 18, 2019, he underwent a lumbar MRI for chronic back pain and lumbar spondylosis. It showed congenitally short pedicles at L2-3 with mild diffuse disc space narrowing and overgrown facets; L3-4 degenerative stenosis, congenitally short pedicles, diffuse disc bulging, narrowing of the foramina, and prominent facets;

¹Asplundh Tree Expert Company is represented by Melissa M. Stickler, and Mr. Cottrill is represented by Adam L. McCoy.

L4-5 mild diffuse disc space bulging and a suspected disc herniation; and L5-S1 disc space bulging and degenerative facet changes.

On June 8, 2020, Mr. Cottrill sought treatment from Dr. Hall for low back pain after slipping. There is no indication that the slip occurred at work and no mention of an occupational injury. Dr. Hall diagnosed lumbar sprain/strain. Mr. Cottrill was seen by Russell Biundo, M.D., on June 16, 2020, for low back pain. He reported that the pain developed after he slipped on gravel on June 4, 2020. There was no mention of an occupational injury. It was noted that Mr. Cottrill had a history of back pain. X-rays performed that day showed small osteophytes from L1 to L4, mild disc space narrowing at L3-4, and mild degenerative facet changes in the lower lumbar spine. Dr. Biundo diagnosed lumbar herniated disc, acute left-sided low back pain with sciatica, lumbar radiculopathy, and acute back pain. An MRI was performed on July 6, 2020, and showed a left disc herniation at L4-5 causing mass effect on the left L5 nerve root; a small L3-4 disc herniation causing mild stenosis; and disc bulging, facet arthropathy, and degenerative changes at L1-2, L2-3, and L5-S1.

On July 13, 2020, Mr. Cottrill and Dr. Hall completed a FMLA form indicating Mr. Cottrill suffered from multiple herniated lumbosacral discs and was unable to walk without a cane. Dr. Hall did not state that Mr. Cottrill's condition was the result of a work-related injury. Mr. Cottrill also completed an application for leave of absence stating that his "back went out" on June 4, 2020. He did not indicate that his injury occurred at work. On October 12, 2020, the claims administrator rejected the claim.

Dr. Hall wrote in a November 13, 2020, letter, that Mr. Cottrill sought treatment on June 8, 2020, for an injury that happened at work on June 4, 2020. Mr. Cottrill reported that he slipped while jumping over a small ditch and twisted his back while trying to catch himself. Dr. Hall stated that despite conservative treatment, Mr. Cottrill is unable to walk without a cane.

Ernie Knotts, Mr. Cottrill's supervisor, asserted in a statement that Mr. Cottrill told him his back was hurting and explained that he slipped in gravel in his driveway a week or so before he requested medical leave. Mr. Knotts stated that though Mr. Cottrill now asserts that he was injured on June 4, 2020, he sought treatment a week or so prior to that date.

Mr. Cottrill testified in a March 24, 2021, expedited hearing that on June 4, 2020, he jumped over a small ditch. The opposite bank was covered in gravel and when he landed, he twisted and almost fell. Mr. Cottrill was off of work the following three days, so he rested hoping his symptoms would resolve. When they did not, he sought treatment. Mr. Cottrill testified that he called his supervisor on June 8, 2020, and reported his work injury. He took a week of vacation time and when he remained unable to work, Mr. Knotts made him file for FMLA leave. On cross-examination, Mr. Cottrill stated that he was treated for low back pain in September of 2019 by Dr. Biundo. He was also given a prescription for hydrocodone for his back in 2019 by his primary doctor. Mr. Cottrill stated that he recovered following the September 2019, treatment and had no further low back treatment until his June 4, 2020, injury.

On April 26, 2021, the Office of Judges reversed the claims administrator and held the claim compensable for lumbar sprain/strain. It found that Dr. Hall, Mr. Cottrill's treating physician, stated in the physician's section of the report of injury that Mr. Cottrill injured his back at work. Dr. Hall also wrote a letter reasserting that Mr. Cottrill suffered an occupational low back injury. The Office of Judges found that Dr. Hall's statements corroborate Mr. Cottrill's assertion of a work-related injury and there is no credible medical evidence to refute Dr. Hall's finding of an occupational injury.

The Office of Judges addressed Asplundh's arguments. First, Asplundh argued that Mr. Cottrill did not file a claim for three months. The Office of Judges found that per West Virginia Code § 23-4-15(a), a claimant has six months to file a claim; therefore, Mr. Cottrill's three month delay in filing does not preclude compensability. Second, Asplundh argued that neither Dr. Hall nor Dr. Biundo mentioned an occupational injury in their initial treatment notes. The Office of Judges found that Dr. Hall clearly opined that Mr. Cottrill suffered an occupational low back injury. Also, Dr. Biundo's June 16, 2020, treatment note states that Mr. Cottrill was injured when he slipped in gravel on June 4, 2020, which is the mechanism of occupational injury and date of injury Mr. Cottrill reported. Asplundh argued that Dr. Hall's statements regarding the occupational injury are based solely on Mr. Cottrill's statements. The Office of Judges concluded that such is true in every worker's compensation case because doctors do not witness the alleged injury firsthand. While Dr. Hall obviously did not witness the injury, the Office of Judges found that he did use his medical training and an examination to conclude that Mr. Cottrill's symptoms were consistent with the reported occupational injury.

Asplundh further argued that Mr. Cottrill's lower back condition preexisted the compensable injury. The Office of Judges found that though Mr. Cottrill had lower back issues in September of 2019, the evidence shows that he recovered and returned to work with no issues. Finally, Asplundh argued that Mr. Cottrill's injury occurred at home. Mr. Knotts completed a statement indicating Mr. Cottrill informed him that he slipped in gravel at home and injured his back. He also asserted that Mr. Cottrill was seeing a doctor for his lower back a week or so prior to the alleged injury. The Office of Judges found that there was no evidence to corroborate Mr. Knotts's statements, whereas Mr. Cottrill's statements regarding the injury were corroborated by Dr. Hall. The Office of Judges determined that Mr. Cottrill established that he sustained a work-related lower back injury. Dr. Hall diagnosed lumbar sprain/strain. Though the record contains evidence of a new disc herniation at L3-4, the Office of Judges determined that there is not sufficient evidence to establish the condition as a compensable diagnosis. Therefore, it held the claim compensable for lumbar sprain/strain. The Board of Review affirmed the Office of Judges' order on September 17, 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. West Virginia Office Insurance Commission*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

Mr. Cottrill has shown that he sustained a compensable injury. His account of the injury is supported by the treatment notes of Dr. Hall. Further, Dr. Hall opined in the report of injury and in his November 13, 2020, letter, that Mr. Cottrill suffered an occupational low back injury. Asplundh offered no credible evidence to refute Mr. Cottrill's assertion of a work-related injury. The statement made by Mr. Knotts is unsupported by the remainder of the evidentiary record. Asplundh argues that Mr. Cottrill's condition was preexisting and noted that he was treated in September of 2019 for low back issues. The record shows, however, that Mr. Cottrill recovered, returned to work, and had no treatment until the compensable injury at issue. Mr. Cottrill has met his burden of proof establishing that he sustained a lumbar sprain/strain in the course of and resulting from his employment.

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