

**STATE OF WEST VIRGINIA
WORKERS' COMPENSATION BOARD OF REVIEW**

STEVEN M. KITTLE,
Appellant

v.

ACNR RESOURCES, INC.,
Appellee

Appeal No. 2058201
JCN: 2022006519
DOI 09/29/2021

ORDER

The following case is an appeal by the claimant from a final order of the Workers' Compensation Office of Judges dated April 1, 2022, which affirmed the claims administrator's order dated October 7, 2021, rejecting the claim.

The Workers' Compensation Board of Review has completed a thorough review of the record, briefs, and arguments. As required, the Workers' Compensation Board of Review has evaluated the decision of the Office of Judges in light of the standard of review contained in West Virginia Code § 23-5-12, as well as the applicable statutory language.

Upon our review of this case, we have determined to affirm the decision of the Office of Judges. The Board adopts the findings of fact and conclusions of law of the Administrative Law Judge's Decision dated April 1, 2022, which relate to the issue on appeal, and the same are incorporated herein by reference, made a part hereof, and are ratified, confirmed and approved.



RECEIVED 09/29/2022


STEVEN M. KITTLE

Appeal No. 2058201

Accordingly, it is ORDERED that the final order of the Workers' Compensation Office of Judges dated April 1, 2022, is hereby AFFIRMED.

From any final decision of the Board, including any order of remand, an application for review may be prosecuted by any party to the Intermediate Court of Appeals within thirty days from the date of this order. **The appeal shall be filed with the Intermediate Court of Appeals (304-558-3258).**

DATED: SEPTEMBER 27, 2022


Nick Casey, Chairperson

cc: STEVEN M. KITTLE
ROBERT STULTZ
ACNR RESOURCES, INC.
AIMEE M. STERN
SMARTCASUALTYCLAIMS

**STATE OF WEST VIRGINIA
WORKERS' COMPENSATION OFFICE OF JUDGES**

IN THE MATTER OF:

JCN: 2022006519

Steven M. Kittle,
CLAIMANT

D.O.I.: 09/29/2021

and

ACNR Resources, Inc.,
EMPLOYER

DECISION OF ADMINISTRATIVE LAW JUDGE

PARTIES:

Claimant, Steven M. Kittle, by counsel, Robert L. Stultz
Employer, ACNR Resources, Inc., by counsel, Aimee M. Stern

ISSUE:

The claimant protested the claim administrator's Order dated October 7, 2021, rejecting the claim.

DECISION:

It is hereby ORDERED that the claim administrator's Order dated October 7, 2021 be AFFIRMED.

RECORD CONSIDERED:

See attached record considered.

FINDINGS OF FACT:

1. The claimant was treated at MedExpress Glen Dale on September 30, 2021 for pain at the first through fifth metatarsals of his left foot. According to the treatment note, the claimant was moving fans at work when he felt a pop or crack in the left foot and a sudden onset of pain. The claimant reported difficulty walking after the event.

A physical examination revealed full, but painful ranges of motion at that left foot, and the claimant had difficulty bearing weight. An x-ray of the claimant's left foot revealed no fractures; however, the x-rays showed "[d]egenerative changes. Mineralization

3

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is decreased. Calcaneal enthesophyte at the insertion of the plantar fascia and Achilles tendon." The claimant was diagnosed with a left foot sprain and restricted to modified duty.

2. The claimant completed a Report of Occupational Injury on September 30, 2021, stating he injured his left foot while walking in a shower house and moving fans. The physician's section was completed at MedExpress Glen Dale on September 30, 2021 and states the claimant had an occupational injury of a left foot sprain. The claimant was restricted to modified duty.

3. The claimant returned to MedExpress Glen Dale on October 7, 2021. The claimant reported left foot swelling and pain when bearing weight. The claimant had reduced left foot ranges of motion, swelling at the metatarsals, tenderness and intermittent numbness. The claimant was diagnosed with a left foot sprain, he was referred for a left foot MRI and he was prescribed bilateral crutches.

4. By claim administrator's Order dated October 7, 2021, the claim was rejected. The claim administrator alleged the claimant did not sustain an injury in the course and as a result of employment. The claimant protested to the Office of Judges.

5. The claimant was treated by Danny Fijalkowski, D.P.M., on October 19, 2021 for left foot pain. Dr. Fijalkowski wrote that the claimant "was at work and heard something pop." The claimant reported severe pain at the left foot, and Dr. Fijalkowski observed swelling. The claimant denied tripping or falling at work and stated he was walking on a flat surface.

Dr. Fijalkowski reviewed the claimant's x-rays from MedExpress, which showed no fracture. However, Dr. Fijalkowski ordered weight-bearing x-rays, which revealed a subacute fracture at the fourth metatarsal. Dr. Fijalkowski diagnosed a closed, non-displaced fracture of the fourth metatarsal of the left foot and left foot pain. He prescribed the claimant a CAM walker boot.

6. A deposition was taken of the claimant on December 14, 2021. The claimant described the alleged injury as follows:

One of my jobs is drying the floor in the shower houses. I was in the shower house for the union employees. In there there's eight different fans. At different times you move them to dry the floors before the next shift gets in. I was in the process of moving one of the fans. I moved the fan and headed towards the next fan and before I got to the --- I believe it was the last fan I took a step and felt something in my foot that felt to me like some sort of tear or, you know, a pull or rip. And I knew that something happened that wasn't, you know, wasn't normal.

The claimant testified that drying the floors required moving eight fans. After the claimant felt foot pain, he sat in a chair for approximately 20 minutes and then returned a

piece of equipment to another area. According to the claimant, while he was walking, he had to lean against or place pressure on walls to reduce the pain. The claimant returned to the bathhouse, informed his supervisor and completed accident reports. On cross-examination, the claimant stated that he was "simply walking" when he felt pain, that he was not running, and that he did not trip or slip. Nevertheless, the claimant stated that he was walking at a brisk pace in order to complete his tasks quickly.

The claimant testified that the employer's safety personnel suggested that he go to an emergency room; however, the claimant's testimony indicates he went home, and when he woke up the following morning, his foot was swollen. Therefore, the claimant called the employer and stated that he was going to seek medical treatment.

The claimant described his treatment at MedExpress Glen Dale and with Dr. Fijalkowski. According to the claimant, he never used the prescribed clutches. At the time of his deposition, the claimant was still wearing the CAM walking boot, and he had an appointment with Dr. Fijalkowski in one week. The claimant testified that Dr. Fijalkowski would determine whether he could return to work at that time.

The claimant testified that his left foot remained "achy" and swollen; however, the claimant clarified that the swelling was reduced. Finally, the claimant mentioned that a coworker who performs the same job tasks wears a step counter and told the claimant that he walked between 14,000 and 15,000 steps a day.

7. The employer submitted a closing argument dated February 15, 2022, which is reviewed and considered for this Decision.

DISCUSSION:

The claimant protested the claim administrator's Order dated October 7, 2021, rejecting the claim. Therefore, this case is before the Office of Judges based on a protest to the Order regarding the compensability of the claim. W. Va. Code § 23-4-1 provides for benefits to employees who receive an injury in the course of and as a result of their covered employment. Three elements must coexist in compensability cases: (1) a personal injury, (2) received in the course of employment, and (3) resulting from that employment. *Barnett v. State Workmen's Compensation Commissioner*, 153 W.Va. 796, 172 S.E. 2d 698 (1970); *Jordan v. State Workmen's Compensation Commissioner*, 156 W.Va. 159, 191 S.E. 2d 497 (1972).

W. Va. Code § 23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue 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. The resolution of issues in claims for compensation must be

decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

The evidence submitted to the Office of Judges indicates the claimant was "simply walking" when he felt pain on September 29, 2021. The claimant was not carrying any materials, and the claimant admitted that he did not trip or slip. The claimant testified that he was walking at a "brisk" pace; however, the claimant's description of the event indicates that his foot pain could have occurred any place, including while not working. In other words, the claimant established that he was injured in the course of employment; however, he did not establish by a preponderance of the evidence that he was injured as a result of employment. Therefore, the claim administrator did not commit error when it rejected the claim on October 7, 2021. The claim administrator's Order is affirmed.

CONCLUSIONS OF LAW:

The claimant did not prove by preponderance of the evidence that he sustained an injury as a result of employment.

Accordingly, it is hereby ORDERED that the claim administrator's Order dated October 7, 2021 be AFFIRMED.

6

APPEAL RIGHTS:

Under the provisions of W.Va. Code § 23-5-12, any aggrieved party may file a written appeal within 30 days after receipt of any decision or action of the Administrative Law Judge. **The appeal shall be filed directly with the Workers' Compensation Board of Review at P.O. Box 2628, Charleston, WV, 25329.**

Date: April 1, 2022



Douglas V. Atkins
Administrative Law Judge

DVA:KC:lkc

cc: STEVEN KITTLE
ROBERT LEE STULTZ - COUNSEL FOR CLAIMANT
ACNR RESOURCES, INC
AIMEE M STERN - COUNSEL FOR EMPLOYER
SMARTCASUALTYCLAIMS

JCN: 2022006519

Date: April 1, 2022

Record Considered

Issue:

The Claimant's protest to the Claims Administrator's order of October 7, 2021, regarding REJECTION OF CLAIM.

EVIDENCE SUBMITTED:

Claimant Evidence

Document Type: Not Specified
Document Date: 9/30/2021
Submit Date: 1/3/2022
Author: MEDEXPRESS GLEN DALE/MEDICAL REPORT

Document Type: Not Specified
Document Date: 9/30/2021
Submit Date: 1/3/2022
Author: EMPLOYEES AND PHYSICIANS REPORT OF INJURY

Document Type: Not Specified
Document Date: 10/7/2021
Submit Date: 1/3/2022
Author: MEDEXPRESS GLEN DALE/MEDICAL REPORT

Document Type: Not Specified
Document Date: 10/19/2021
Submit Date: 1/3/2022
Author: DR. DANNY FIJALKOWSKI, DPM./CLINICAL NOTE

Document Type: Not Specified
Document Date: 12/14/2021
Submit Date: 1/3/2022
Author: STEVEN KITTLE/DEPOSITION

Employer Evidence

Document Type: Not Specified
Document Date: 9/30/2021
Submit Date: 2/10/2022

Author: MEDEXPRESS GLEN DALE/MEDICAL REPORT

Document Type: Not Specified

Document Date: 9/30/2021

Submit Date: 2/10/2022

Author: TELERADIOLOGY SPECIALISTS X-RAY/LEFT
FOOT

Document Type: Not Specified

Document Date: 9/30/2021

Submit Date: 2/10/2022

Author: EMPLOYEES AND PHYSICIANS REPORT OF
INJURY

Document Type: Not Specified

Document Date: 10/7/2021

Submit Date: 2/10/2022

Author: CLAIMS ADMINISTRATORS ORDER/DENYING
BENEFITS

Document Type: Not Specified

Document Date: 10/14/2021

Submit Date: 2/10/2022

Author: MARSHALL COUNTY COAL RESOURCES/SICKNESS AND
ACCIDENT BENEFITS FORM

Document Type: Not Specified

Document Date: 10/19/2021

Submit Date: 2/10/2022

Author: WHEELING HOSPITAL/AMBULATORY CARE SERVICES/
DR. DANNY FIJALKOWSKI, MD./CLINI

Document Type: Not Specified

Document Date: 10/19/2021

Submit Date: 2/10/2022

Author: WHEELING HOSPITAL RADIOLOGY X-RAY/LEFT
FOOT

CLOSING ARGUMENTS:

Party Submitted: Employer

Letter Date: 2/15/2022