

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**JOSEPH HARDWAY,
Claimant Below, Petitioner**

FILED
March 25, 2016
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 14-1122 (BOR Appeal No. 2049377)
(Claim No. 2014002255)

**KONE, INC.,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Joseph Hardway, by Patrick K. Maroney, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Kone, Inc., by Jeffery B. Brannon, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated October 3, 2014, in which the Board affirmed in part an April 7, 2014, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 24, 2013, decision which denied the request for an FCE, work hardening, and work conditioning from TV Orthopedics and Physical Therapy. The Office of Judges affirmed the July 10, 2013, claims administrator's decision insofar as it denied the request to update the claim to include the diagnoses neck sprain, carpal tunnel syndrome, and pronator syndrome. However the Office of Judges reversed the claims administrator's decision insofar as it denied the addition of cervical radiculopathy to the claim. The Office of Judges added the condition as a compensable component of the claim. The Office of Judges affirmed the claims administrator's July 12, 2013, decision which denied the request to reopen the claim for temporary total disability benefits. The Office of Judges affirmed the claims administrator's August 8, 2013, decision which denied the request for treatment for diagnostic arthroscopy of the right shoulder and a possible repair of the labrum tear. The Board of Review reversed and vacated the finding of the Office of Judges that cervical radiculopathy was a compensable condition of the claim and reinstated the claims administrator's July 10, 2013, decision which found that cervical radiculopathy was not a compensable condition of the claim. 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 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. Hardway, a mechanic for Kone, Inc., injured himself on April 6, 2012, when his channel locks slipped off a bolt. He reported that it jerked his shoulder. He was treated by Donald Seidler, M.D., who diagnosed a right rotator cuff tear on the day of the injury. On April 10, 2012, Mr. Hardway underwent an MRI, which revealed a rotator cuff tear. On April 11, 2012, records from Health Plus Urgent Care show he was diagnosed a rotator cuff tear. He was advised to only do light duty work for the next fourteen days. Mr. Hardway went to Holzer Clinic for pain in his shoulder on June 13, 2010. The clinic diagnosed a neck sprain, mild carpal tunnel syndrome on the right side, mild pronator syndrome, and cervical radiculopathy. This was the first time Mr. Hardway indicated that he had pain or injury in his neck. The clinic opined that all the diagnoses with the exception of carpal tunnel syndrome and pronator syndrome were related to the April 6, 2012, injury. They suggested physical therapy. On June 13, 2012, Mr. Hardway underwent a nerve conduction study. Marietta Babayev, M.D., interpreted the results and diagnosed carpal tunnel syndrome and pronator syndrome. However, Dr. Babayev opined that both conditions pre-existed the compensable injury. On September 20, 2012, notes from Holzer Clinic show he presented with continued pain in his neck. An MRI of the cervical spine revealed degenerative disc disease at C4-5, C5-6, and C6-7 with narrowing of the disc spaces and bulging annulus as well as hemangioma at the C3 vertebral body. Dr. Babayev recommended that he follow-up with James Cox, D.O., for right shoulder surgery.

On October 17, 2012, Mr. Hardway was seen by Dr. Cox. Dr. Cox's office notes indicated that he believed Mr. Hardway was at his maximum degree of medical improvement. However on November 5, 2012, a report from Holzer Clinic indicated he presented with pain in the right shoulder and neck. Dr. Babayev told Mr. Hardway that workers' compensation did not authorize injections for pain. According to Dr. Babayev, this made him visibly upset and he raised his voice. Dr. Babayev stated that he should find another treating physician and follow-up with Dr. Cox. On July 26, 2013, Mr. Hardway had another MRI. It revealed a para labral cyst anteriorly with associated underlying labral tear and evidence of previous rotator cuff repair with revision. Also, some subacromial subdeltoid bursitis was noted.

On July 31, 2013, Mr. Hardway reported back to Dr. Cox with pain in the back of his shoulder and less frequently in the front of his shoulder. The physical exam revealed full painless range of motion of the neck. Dr. Cox, reviewing the MRI, advised that the rotator cuff appeared to be intact; however, there were three small anterior labral cysts that could be obscuring an anterior labral tear. It was further noted that Dr. Cox was not able to tell for certain whether there was a labral tear. The assessment was glenoid labrum tear. Dr. Cox indicated that without additional intervention, Mr. Hardway had reached his maximum degree of medical improvement. Dr. Cox recommended diagnostic arthroscopy of the right shoulder and a possible repair of the labrum tear. On August 6, 2013, Dr. Cox filled out a diagnosis update. Dr. Cox indicated the

primary diagnosis was rotator cuff sprain and the secondary diagnoses were shoulder and upper arm sprain, sprain of the shoulder and arm, and pain in the limb. On August 28, 2013, Dr. Cox filled out another diagnosis update. Dr. Cox indicated the primary diagnosis was glenoid labrum tear and the secondary diagnoses were rotator cuff tear and right cervical radiculopathy.

Prior to his compensable injury, on September 11, 2006, Mr Hardway underwent an x-ray of the cervical spine. It revealed early degenerative changes at C5-6 and C6-7 disc space levels. There was no evidence of an acute bony injury. Mr. Hardway indicated to Charleston Area Medical Center that he had fallen at home around four days earlier and that his neck and shoulder were hurting. Between June 25, 2009, and December 14, 2012, Mr. Hardway reported to Holzer Clinic several times. The records indicated he underwent electrodiagnostic testing, MRI, physical therapy, operations, and treatment. The treatment notes indicate he was diagnosed with neck pain, muscle spasm, neck strain, cervical radiculopathy on the right side, mild pronator syndrome on the right side, muscle weakness, thoracic outlet syndrome, segmental dysfunction of cervical region, lumbar spondylosis, and lumbar radiculopathy. However, the records also indicate that his neck pain has resolved, he was working full duty, had increased range of motion, and met all his rehabilitation goals.

The claims administrator approved the application for a right rotator cuff sprain on May 4, 2012. Then on January 15, 2013, an independent medical evaluation from Paul Bachwitt, M.D., was made available. Dr. Bachwitt opined that Mr. Hardway had reached his maximum degree of medical improvement. Dr. Bachwitt reported no evidence of radiculopathy. Dr. Bachwitt noted that the distal clavicle resection was performed during a prior rotator cuff repair of the right shoulder.

On May 15, 2013, a report from Ashton Medical Associates showed low back pain in the lower left side. He noted it began while lifting rocks in his yard. Mr. Hardway reported he had no neck pain during a review of the systems. The assessment was lumbago and osteoarthritis. The plan called for Mr. Hardway to use a heating pad and to continue taking Lortab. He was also instructed to follow-up.

On April 24, 2013, the claims administrator denied the request for a functional capacity evaluation, work hardening, and work conditioning from TV Orthopedics and Physical Therapy. The claims administrator based its decision upon the treatment not being appropriately related to the allowed conditions in the claim. Then on July 10, 2013, the claims administrator denied the request from Dr. Babayev to update the claim to include the diagnoses neck sprain, cervical radiculopathy, carpal tunnel syndrome, and pronator syndrome. The request was denied due to there being no evidence that the conditions were causally related to the claim and according to the diagnoses update request, the conditions were pre-existing. On July 12, 2013, the claims administrator denied the request to reopen the claim for temporary total disability benefits based upon the finding of Dr. Cox dated October 17, 2012, which indicates Mr. Hardway had reached his maximum degree of medical improvement. On August 8, 2013, the claims administrator denied the request for treatment from Dr. Cox dated July 31, 2013. The claims administrator determined that requested treatment was not for a covered condition in the claim. Mr. Hardway protested all the above referenced decisions.

On August 27, 2013, Mr. Hardway was deposed. He testified that Dr. Cox recommended a functional capacity evaluation, work conditioning and work hardening for the neck and shoulder.

The Office of Judges addressed the compensability of the neck sprain, cervical radiculopathy, carpal tunnel syndrome, and pronator syndrome first. The Office of Judges determined that right carpal tunnel syndrome and pronator syndrome were not received in the course of and as a result of his employment. The Office of Judges acknowledged that Dr. Babayev stated in her diagnosis update that right carpal tunnel syndrome and pronator syndrome were pre-existing conditions. Because the conditions were pre-existing, the Office of Judges determined they were not related to the April 6, 2012, compensable injury. The Office of Judges further found that the neck sprain was not received in the course of and as a result of his employment. The Office of Judges determined that Mr. Hardway had no diagnosis or complaints of neck pain until June 13, 2012, when Dr. Babayev made the neck sprain diagnosis. Mr. Hardway's report of injury did not mention neck pain or an injury to the neck. In addition, after switching physicians, Dr. Cox found Mr. Hardway had full painless range of motion of the neck on July 31, 2013. Dr. Cox did not diagnose a neck strain either. Furthermore, Mr. Hardway was seen by Ashton Medical Associates, Inc., for a non-work related incident. Mr. Hardway reported he had no neck pain during a review of the systems.

The Office of Judges found that cervical radiculopathy was received in the course of and as a result of his employment. The Office of Judges noted that the employer submitted records prior to the compensable injury which established a pre-existing diagnosis of cervical radiculopathy. However, the Office of Judges used those records as further evidence that Mr. Hardway was asymptomatic before the occurrence of the April 6, 2012, compensable injury. Per the diagnosis update filled out by Dr. Babayev on June 18, 2012, Mr. Hardway was previously treated for a neck strain and right cervical radiculopathy. He was last seen in September of 2009. Mr. Hardway stated that after the visit his symptoms had resolved and he did not have neck pain or radiating right upper limb pain until the injury of April 6, 2012. This is verified by the report of the Holzer Clinic dated October 1, 2009, in which Mr. Hardway reported that his pain had resolved. Mr. Hardway was noted to be working full duty and had increased range of motion. Mr. Hardway was found to have met all of his rehabilitation goals. Based upon the EMG conducted on June 13, 2012, Dr. Babayev diagnosed Mr. Hardway with right cervical radiculopathy. In her reports, Dr. Babayev opined the cervical radiculopathy was related to Mr. Hardway's work injury. This diagnosis was further supported by Dr. Cox's report dated August 28, 2013, in which he also opined that right cervical radiculopathy was related to the compensable work injury.

The Office of Judges found that authorization of a functional capacity evaluation, work hardening, and work conditioning were not medically related and reasonably required for the compensable injuries of the claim. The Office of Judges pointed out that the specific request has not been submitted as evidence. The Office of Judges then examined the record of evidence for an indication as to why the request was being made. Because the Office of Judges was unsure why the request was even being made, it concluded Mr. Hardway failed to show that it was

medically related and reasonably required for his compensable injuries. The Office of Judges noted that on July 31, 2013, Mr. Hardway requested diagnostic and surgical arthroscopy of the right shoulder for a possible labral tear. The Office of Judges found that the claims administrator was not in error for denying authorization for such. The Office of Judges found that there was no medical opinion showing how the labral tear, if existing, was related to the compensable injury. The Office of Judges found that the request for labral tear to be added was based upon the July 26, 2013, MRI. However, Dr. Cox could not tell for certain if there was a labral tear. Because Mr. Hardway could not show his possible labral tear was related to his compensable injury, the Office of Judges denied arthroscopy for the repair of such.

The Office of Judges noted that no claim reopening application had been made part of the record. The Office of Judges discussed that Mr. Hardway testified he last received temporary total disability benefits in December of 2012. The Office of Judges then reviewed all his compensable conditions. For the right rotator cuff sprain the evidence establishes that Mr. Hardway was at his maximum degree of medical improvement per Dr. Cox's report on October 17, 2012. Furthermore, this position was further clarified in his January 7, 2013, report. Despite this claim being held compensable for cervical radiculopathy there is no medical evidence of record indicating that the reopening request is based upon cervical radiculopathy. Mr. Hardway has been diagnosed with multiple conditions, some of which have not been found compensable conditions of the claim. Mr. Hardway does complain of neck pain; however, some of his multiple diagnoses are related to the cervical spine and are not compensable. Thus, the Office of Judges determined that Mr. Hardway did not meet his burden of proof to show that he has suffered an aggravation or progression of a compensable condition or that there was some other fact or facts which was not previously considered.

The Board of Review agreed with the Office of Judges on all the issues except for the finding that cervical radiculopathy was a compensable condition. Based upon the lapse of time between the injury and the symptoms, Mr. Hardway's extensive pre-existing cervical problems including cervical radiculopathy, and Dr. Cox's finding of full painless range of motion of the neck, the Board of Review concluded the evidence failed to demonstrate that the diagnosis of cervical radiculopathy was causally related to the compensable injury. The Board of Review found that Mr. Hardway signed a claim application on April 6, 2012, in which he indicated that he injured his right shoulder and arm. He was treated by Dr. Seidler on April 6, 2012, and the diagnosis was a tear of the right rotator cuff. There was no mention of a neck injury. On April 11, 2012, Mr. Hardway went to Health Plus, and again, the diagnosis was right shoulder rotator cuff tear. Two months later, on June 13, 2012, Dr. Babayev diagnosed neck sprain and cervical radiculopathy, in addition to other conditions. This was the first time Mr. Hardway mentioned any cervical issues after his injury. This evidence showed the distance in time between the alleged injury and the manifestation of neck symptoms. On July 31, 2013, Dr. Cox examined Mr. Hardway and found full painless range of motion of the neck. In addition, prior to the compensable injury, Mr. Hardway underwent extensive treatment for cervical problems. On September 11, 2006, he was seen at Charleston Area Medical Center for complaints of neck pain following a fall. The cervical x-rays showed early degenerative changes. In 2009, Mr. Hardway was treated for neck pain radiating to the right shoulder. On June 29, 2009, he told Dr. Majoris that he first experienced neck pain in 1996 after having shoulder surgery. Dr. Majoris diagnosed

muscle weakness, thoracic outlet syndrome, neck strain, and segmental dysfunction of cervical region. On August 12, 2009, the diagnosis was neck strain, mild pronator syndrome, and cervical radiculopathy. An MRI of the cervical spine, which was performed on August 19, 2009, showed a small disc protrusion posterolaterally to the left at C4-5 and a mild, broad base disc bulge at C6-7 posterolaterally to the left. Following the compensable injury of April 6, 2012, no diagnosis or complaints relating to Mr. Hardway's neck were of record until June 13, 2012. The extensive cervical problems and treatment indicate that it is probable that Mr. Hardway's cervical problems were pre-existing and not casually connected to the compensable injury. Based upon the lapse of time between the injury and symptoms, Mr. Hardway's pre-existing cervical problems including cervical radiculopathy, and Dr. Cox's finding of full painless range of motion of the neck, the Board of Review concluded the evidence failed to demonstrate that the diagnosis of cervical radiculopathy was causally related to the compensable injury.

We agree with the Board of Review. The Office of Judges should not have found that cervical radiculopathy was a compensable condition because the symptoms manifested to far after the compensable injury, there were pre-existing cervical spine issues, and he was at his maximum degree of medical improvement with full range of motion in his neck. The diagnoses of right carpal tunnel syndrome and pronator syndrome were not compensable conditions because they pre-existed the compensable injury. The neck strain was properly denied because of the lapse of time between the injury and the complaints of pain. The Office of Judges was also justified in denying the addition of a neck strain as a compensable condition based on Dr. Cox's finding of full painless range of motion of the neck. Because the Office of Judges was unable to determine why the request was being made for a functional capacity evaluation, work hardening, and work conditioning, Mr. Hardway failed to show that these requests were medically related and reasonably required for his compensable injuries. The surgical arthroscopy of the right shoulder was properly denied because there was no medical opinion showing how the labral tear, if existing, was related to the compensable injury. Finally, the reopening application was properly denied because Mr. Hardway did not supply sufficient evidence to show he was still disabled. Furthermore, Dr. Cox's report on October 17, 2012, supported the position he was at his maximum degree of medical improvement and required no further medical treatment.

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: March 25, 2016

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin J. Davis
Justice Allen H. Loughry II

DISSENTING:

Justice Brent D. Benjamin, concurs in part and dissents in part. I would reverse the Board of Review's reversal of the April 7, 2014 Administrative Law Judge's order which found cervical radiculopathy compensable.

Justice Margaret L. Workman