

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**GREENBRIER HOTEL CORPORATION,
Employer Below, Petitioner**

vs.) No. 16-0507 (BOR Appeal No. 2050951)
(Claim No. 2015019613)

**GERSON D. GUTIERREZ,
Claimant Below, Respondent**

FILED

March 30, 2017
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Greenbrier Hotel Corporation, by James Heslep, its attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review.

This appeal arises from the Board of Review's Final Order dated April 29, 2016, in which the Board affirmed a November 20, 2015, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's February 4, 2015, decision rejecting Mr. Gutierrez's claim for workers' compensation benefits, and the Office of Judges held the claim compensable for a right foot injury. 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. Gutierrez alleges that he sustained a right foot injury while walking down a set of steps upon arrival at his workplace on January 19, 2015. On the alleged date of injury, an incident report was completed. The incident report indicates that Mr. Gutierrez experienced sharp pain in his right foot while walking down a set of steps. Additionally, an injury investigation report was completed by Crystal Wills, one of Mr. Gutierrez's supervisors. Ms. Wills indicated that Manuel Espino, one of Mr. Gutierrez's coworkers, reported observing Mr. Gutierrez limping upon arrival at his workplace.

At the end of the workday on the alleged date of injury, Mr. Gutierrez sought treatment with Tamra Stall, M.D., who noted that Mr. Gutierrez reported injuring his right foot while walking down a set of steps. Dr. Stall recommended that Mr. Gutierrez undergo a right foot MRI. Additionally, Dr. Stall completed a Report of Injury in which she indicated that Mr. Gutierrez sustained an acute occupational injury to his right foot while walking down a set of steps. On January 22, 2015, Mr. Gutierrez underwent a right foot MRI which revealed a small plantar fascial tear. Mr. Gutierrez sought treatment with Steven Vess, D.O., on January 27, 2015. Dr. Vess also noted that Mr. Gutierrez reported injuring his right foot while walking down a set of steps, and diagnosed Mr. Gutierrez with plantar fasciitis of the right foot.

On February 4, 2015, James Dauphin, M.D., performed a records review and recommended rejecting Mr. Gutierrez's claim for workers compensation benefits. After reviewing the incident report in which it was reported that Mr. Espino observed Mr. Gutierrez limping prior to his arrival at his workplace, Dr. Dauphin concluded that Mr. Gutierrez was injured prior to his arrival at work. The claims administrator rejected Mr. Gutierrez's claim based upon Dr. Dauphin's records review on February 4, 2015.

Mr. Gutierrez was deposed on July 29, 2015. He testified that he did not experience any pain in his right foot prior to his arrival at work on January 19, 2015. Mr. Gutierrez further testified that he began to experience intense right foot pain while walking down a set of steps upon his arrival at his workplace on the morning of January 19, 2015. Finally, he testified that Mr. Espino was walking with him at the time of the alleged injury, and further testified that Mr. Espino assisted him following the alleged injury.

In its Order reversing the February 4, 2015, claims administrator's decision, the Office of Judges held that the evidence of record demonstrates that Mr. Gutierrez sustained a compensable right foot injury on January 19, 2015. The Board of Review affirmed the reasoning and conclusions of the Office of Judges in its decision dated April 29, 2016. On appeal, Greenbrier Hotel Corporation asserts that Mr. Gutierrez has failed to demonstrate that he sustained an injury in the course of and resulting from his employment.

The Office of Judges noted that diagnostic imaging revealed a plantar fascial tear of the right foot. Further, the Office of Judges noted that Mr. Gutierrez's treating physician, Dr. Stall, indicated that Mr. Gutierrez sustained an occupationally-related injury. The Office of Judges also found that Mr. Gutierrez's testimony that he injured his right foot while entering his workplace is credible. Additionally, the Office of Judges found that the report of Dr. Dauphin is entitled to less evidentiary weight given that the conclusions expressed therein amount to nothing more than tacit acceptance of the incident report completed by Ms. Wills. In that regard, the Office of Judges found that Ms. Wills's incident report relies primarily upon the statements made to her by Mr. Espino. The Office of Judges then noted that a direct statement from Mr. Espino is not contained in the evidentiary record. Finally, the Office of Judges concluded that the evidence of record fails to demonstrate that Mr. Gutierrez's right foot injury can be attributed to a non-work-related occurrence. We agree with the reasoning and conclusions of the Office of Judges, as affirmed by the Board of Review.

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 30, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Elizabeth D. Walker

DISSENTING:

Justice Menis E. Ketchum