

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

September 13, 2019
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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**HANCOCK COUNTY BOARD OF EDUCATION,
Employer Below, Petitioner**

vs.) No. 18-0767 (BOR Appeal No. 2052540)
(Claim No. 2016005856)

**LESTER HOWELL,
Claimant Below, Respondent**

MEMORANDUM DECISION

Petitioner Hancock County Board of Education, by Jane Ann Pancake and Jeffrey B. Brannon, its attorneys, appeals the decision of the West Virginia Workers' Compensation Board of Review. Lester Howell, by M. Jane Glauser, his attorney, filed a timely response.

The issues on appeal are additional compensable conditions and medical treatment. The claims administrator denied a request for repeat thoracic epidural steroid injections on May 11, 2017. On May 18, 2017, it denied a request to add herniated discs at T1-2 and T9-10 to the claim. The Office of Judges reversed the May 11, 2017, decision and authorized the injections in its January 24, 2018, Order. In its Order, it also modified the May 18, 2017, decision to add T1-2 disc herniation to the claim. The Order was affirmed by the Board of Review on July 24, 2017.

The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration. 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. Howell, a bus driver, was injured in the course of his employment on August 26, 2015, when the bus he was driving was rear-ended by another vehicle. Mr. Howell sought treatment from Stephen Mascio, D.O., on August 28, 2016, and reported left-sided back pain that was a little higher than his prior injury. Mr. Howell suffered a lumbosacral sprain and L5-S1 annular tear in 2014. Mr. Howell also stated that he had numbness in the toes of his right foot. Dr. Mascio diagnosed thoracic sprain and exacerbation of Mr. Howell's prior lumbosacral sprain and annular disc tear at L5-S1. Mr. Howell returned on September 10, 2015, and stated that his back still hurt

but that he had returned to full duty work. Dr. Mascio recommended physical therapy. The claims administrator authorized twelve physical therapy sessions on September 22, 2015.

In the Employees' and Physicians' Report of Injury, Mr. Howell indicated that his back was injured in a motor vehicle accident. Dr. Mascio completed the physician's section and listed the injury as lumbar and thoracic sprains. The claim was held compensable for sprains of the thoracic and lumbosacral spine on September 11, 2015. Mr. Howell returned to Dr. Mascio on October 15, 2015, with continued pain and numbness in his lower back. Physical therapy had provided no relief and his range of motion was painful. Dr. Mascio recommended a referral to pain management, which was approved by the claims administrator on January 26, 2016.

Bill Hennessey, M.D., performed an independent medical evaluation on February 1, 2016, in which Mr. Howell reported constant pain in his thoracic spine. He did not report lower back pain or lower extremity symptoms at the time of the evaluation. Dr. Hennessey found he had reached maximum medical improvement. He stated that Mr. Howell had fully recovered from his lumbosacral strain. For the thoracic spine, Dr. Hennessey stated that an MRI would be reasonable and if nothing was found, no additional treatment would be necessary. He assessed 5% thoracic spine impairment.

A thoracic MRI was performed on February 22, 2016, and showed a small disc protrusion at T1-2 and a small protrusion or osteophyte at T9-10. Mr. Howell also had mild degenerative disease of the thoracic spine. On February 23, 2016, Mr. Howell was treated by Stephanie Le, M.D., for pain management. Physical examination showed pain, tenderness, and restricted range of motion in the thoracic and lumbar spine. Dr. Le noted that though Mr. Howell had preexisting lumbar spine pain, his thoracic pain resulted from his compensable injury. She recommended thoracic epidural steroid injections, which Mr. Howell received twice. On August 28, 2016, he reported that his thoracic pain had improved following the steroid injections. The claims administrator denied a request for further injections on April 19, 2016.

Dr. Mascio prepared a medical statement on May 18, 2016, and requested authorization for thoracic epidural steroid injections. He stated that the injections were medically necessary treatment for the thoracic spine injury. Mr. Howell continued to have pain, aching, and numbness in his thoracic spine and had failed conservative treatment with physical therapy and anti-inflammatories. On June 6, 2016, the claims administrator granted thoracic epidural steroid injections with authorized treatment dates between February 23, 2016, and May 31, 2016.

Mr. Howell returned to Dr. Le on January 19, 2017, with constant pain, tingling, and numbness in his back. Physical examination showed tenderness in the thoracic paraspinal muscles and range of motion restriction in the thoracic spine. Dr. Le diagnosed lumbosacral ligament sprain, backache, and degeneration of intervertebral disc of the lumbar region. On February 16, 2017, Mr. Howell again reported constant pain. Dr. Le recommended two thoracic epidural steroid injections and administered the first on February 22, 2017.

The claims administrator denied Dr. Le's request for thoracic epidural steroid injections on March 7, 2017. On April 5, 2017, Dr. Le requested that thoracic disc herniation be added to the

claim. She also requested authorization of thoracic epidural steroid injections to treat Mr. Howell's T1-2 disc herniation since the injections had previously provided symptom relief.

Dr. Mascio completed a diagnosis update on April 24, 2017, in which he requested that thoracic strain, lumbar strain, herniated T1-2 disc, and herniated disc versus osteophyte at T9-10 be added to the claim. He stated that the request was based upon Mr. Howell's subjective complaints and the February 22, 2016, MRI.

Michael Skaredoff, M.D., performed a record review on April 26, 2017, in which he was asked if thoracic epidural steroid injections should be authorized. Dr. Skaredoff used the Occupational Disability Guidelines, stating that West Virginia workers' compensation rules provide no guidance on epidural injections. The Occupational Disability Guidelines stated that the primary criteria for epidural injections is objective evidence of radiculopathy. Dr. Skaredoff found no such evidence of radiculopathy in Mr. Howell's medical records. He therefore recommended denying the request. The claims administrator denied the request for thoracic epidural steroid injections on May 11, 2017. On May 18, 2017, it also denied a request to add herniated discs at T1-2 and T9-10 to the claim.

On July 24, 2017, Dr. Hennessey performed an independent medical evaluation in which Mr. Howell reported constant thoracic spine pain. Physical examination showed some pain to palpation at the T8 level. Dr. Hennessey found that Mr. Howell had reached maximum medical improvement and assessed 5% thoracic spine impairment. Dr. Hennessey also opined that Mr. Howell does not have a herniated disc at T1-2 or T9-10. Dr. Hennessey stated that he had no pain at T1-2 and that the MRI showed no evidence of disc herniations at T1-2 or T9-10.

Jonathan Luchs, M.D., performed an October 5, 2017, aging analysis of Mr. Howell's MRI. Dr. Luchs concurred with the primary reader's finding of degenerative disc disease in the thoracic spine. He stated that there are no annular tears or acute disc herniations and concluded that the findings seen on the MRI are chronic and degenerative.

In its January 24, 2018, Order, the Office of Judges reversed the claims administrator's denial of repeat thoracic epidural steroid injections and authorized the treatment. It also modified the claims administrator's decision denying the addition of T1-2 and T9-10 disc herniations to the claim and added T1-2 disc herniation as a compensable condition. It found that the weight of the evidence shows that T9-10 disc herniation should not be added to the claim. Dr. Irwin, who interpreted the February 22, 2016, MRI, stated that it showed a disc protrusion or osteophyte at T9-10. His final impression was degenerative disease. Dr. Mascio requested in his diagnosis update that T9-10 herniated disc versus osteophyte be added to the claim. He also characterized the findings at T9-10 as a possible herniation. Finally, the Office of Judges noted that Dr. Le also reviewed the MRI and stated that the findings at T9-10 were degenerative changes as opposed to a disc herniation. The Office of Judges concluded that an osteophyte is a bone spur and is associated with osteoarthritis rather than injury. It held that a preponderance of the evidence showed that T9-10 disc herniation should not be added to the claim.

In regard to the T1-2 herniated disc, the Office of Judges found that a preponderance of the evidence shows the condition should be added to the claim. An MRI taken six months after the compensable injury showed a herniated disc at T1-2. The Office of Judges found no evidence in the record of a herniation at that level prior to the compensable injury. Both Dr. Mascio, Mr. Howell's primary physician, and Dr. Le, his pain management specialist, opined that the T1-2 disc herniation resulted from the compensable injury. The Office of Judges found their opinions to be supported by the weight of the medical evidence.

The Office of Judges further noted that Mr. Howell's thoracic symptoms coincided with the compensable injury. It found that the employer's evidence shows Mr. Howell had never been diagnosed with a thoracic condition prior to the compensable injury. The employer relied on Dr. Hennessey's independent medical evaluation in which he opined that Mr. Howell had no pain at T1-2 and that the MRI showed no evidence of a T1-2 disc protrusion. The Office of Judges found that the record is full of treatment notes by Drs. Mascio and Le documenting severe thoracic spine pain. Further, Drs. Irwin, Le, Mascio, and Luchs all concluded that Mr. Howell's thoracic MRI showed a disc protrusion at T1-2. The employer argued that Drs. Irwin and Luchs concluded that the findings seen at T1-2 are degenerative in nature. The Office of Judges found that Dr. Le read the MRI as showing a disc herniation at T1-2 and degenerative disc disease at T9-10, which indicates she did not associate the T1-2 herniation with degenerative disease. The Office of Judges further determined that Dr. Luchs's findings are less persuasive than those of Drs. Mascio and Le. Dr. Luchs performed a record review only, whereas Drs. Mascio and Le have examined and treated Mr. Howell on multiple occasions. The Office of Judges concluded that the sudden onset of thoracic symptoms following the compensable injury strongly suggests a traumatic injury, and the symptoms have persisted long past what would be expected from a simple sprain/strain.

Lastly, the Office of Judges determined that the requested epidural steroid injections should be authorized. Drs. Mascio and Le both opined that epidural steroid injections are medically necessary treatment for Mr. Howell's compensable injury. Dr. Le has administered the injections in the past for T1-2 disc herniation, and Mr. Howell saw 50% pain relief from the treatment. As herniated T1-2 disc is a compensable condition and Dr. Le opined in her treatment request that the injections were necessary to treat T1-2 disc herniation, the Office of Judges concluded that the treatment was medically related and reasonably required. The employer argued, per the file review of Dr. Skaredoff, that the treatment is not necessary. Dr. Skaredoff opined that epidural steroid injections were indicated for radiculopathy, which Mr. Howell does not have. The Office of Judges found his opinion to be less reliable than that of Dr. Le. Dr. Le is Mr. Howell's pain management physician and has treated him several times. Dr. Skaredoff, on the other hand, has never actually examined Mr. Howell. The Office of Judges therefore concluded that Dr. Le is in a better position to determine Mr. Howell's current medical condition and treatment needs. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its decision on July 24, 2018.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. An additional condition may be added to a claim if a claimant can show that it was a personal injury, received in the course of employment, and resulting from that employment. West Virginia Code § 23-4-1 (2018). In this case, Mr. Howell presented

sufficient evidence to show that his T1-2 disc herniation was the result of his motor vehicle accident which occurred in the course of and resulted from his employment. Regarding the requested treatment, West Virginia Code § 23-4-3(a)(1) (2018) provides that the claims administrator must provide medically related and reasonably required sums for healthcare services, rehabilitation services, durable medical and other goods, and other supplies. A preponderance of the evidence indicates that epidural steroid injections are medically related and reasonably required treatment for Mr. Howell's T1-2 disc herniation.

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: September 13, 2019

CONCURRED IN BY:

Chief Justice Elizabeth D. Walker
Justice Margaret L. Workman
Justice Tim Armstead
Justice Evan H. Jenkins
Justice John A. Hutchison