

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**FILED**

September 13, 2019  
EDYTHE NASH GAISER, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**JERRY NIBERT,**  
**Claimant Below, Petitioner**

**vs.) No. 18-0805** (BOR Appeal No. 2052723)  
(Claim No. 2016014360)

**GLOBE SPECIALTY METALS, INC.,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Jerry Nibert, by Reginald D. Henry, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Globe Specialty Metals, Inc., by Noah A. Barnes and Jeffrey B. Brannon, its attorneys, filed a timely response.

The issue on appeal is additional compensable conditions. The claims administrator denied the addition of lumbar spondylosis without myelopathy and lumbar radiculopathy to the claim on April 17, 2017. The Office of Judges affirmed the decision in its March 12, 2018, Order. The Order was affirmed by the Board of Review on August 20, 2018.

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. Nibert, a welder, was injured in the course of his employment on November 17, 2015, while pushing a stationary welder. A November 20, 2015, treatment note from Montgomery General Hospital indicates Mr. Nibert was seen for back pain/injury that had been present for two to three weeks. Mr. Nibert reported that the pain radiates into his legs. He was diagnosed with sciatica. The Employees' and Physicians' Report of Injury was completed that day by Jonathan Hess, M.D. He diagnosed lumbosacral strain with radiculopathy. It was indicated that the injury aggravated a prior injury or disease.

A lumbar MRI was performed on December 4, 2015, and showed diffuse disc bulging at L3-4 with flattening of the thecal sac and probable nerve root impingement; diffuse disc bulging at L4-5 with flattening of the thecal sac and possible nerve root impingement; bulging at L5-S1; and dehydration and degenerative disc disease at L3-4, L4-5, and L5-S1. The claims administrator held the claim compensable for lower back sprain/strain on December 30, 2015.

Mr. Nibert sought treatment from Matthew Walker, M.D., on January 28, 2016, for lower back, buttock, and bilateral leg pain. Mr. Nibert reported that pain radiated from his buttock, down his legs, and into his feet. He also reported leg weakness and numbness. He stated that his symptoms began when he was pushing on a welder at work. Dr. Walker noted that Mr. Nibert has a history of lower lumbar pain. Dr. Walker read the MRI and diagnosed lumbar spinal stenosis, lumbar disc degeneration, and lumbosacral spondylosis.

Timothy Deer, M.D., treated Mr. Nibert on May 26, 2016, for what Mr. Nibert asserted was lower back pain that began after a November of 2015 work injury. Mr. Nibert denied any pain radiating into his legs. Range of motion was abnormal, and he had tenderness in the lumbar facet joints. Neurological examination showed no numbness in the lower extremities, and straight leg raising test was negative. Dr. Deer diagnosed lumbar disc degeneration, lumbar spondylosis without myelopathy, and lumbar radiculopathy. On August 9, 2016, Mr. Nibert reported that physical therapy had provided no relief, but facet injections gave him moderate relief.

On August 20, 2016, Mr. Nibert saw Warren Grace, M.D., and reported constant back pain with intermittent radiation into the legs. Examination showed tenderness of the lumbosacral spine and facet joint, as well as lumbosacral muscle spasms. Range of motion was abnormal and neurological examination showed numbness, tingling, and paresthesia in the legs. Dr. Grace diagnosed lumbar spondylosis without myelopathy or radiculopathy.

A.E. Landis, M.D., performed an independent medical evaluation on October 10, 2016, in which he noted that Mr. Nibert had advanced degenerative changes in both knees and his right hip. On examination, Dr. Landis found no muscle spasms or tenderness in the lumbar spine. Dr. Landis concluded that Mr. Nibert sustained a lumbar sprain/strain as a result of his compensable injury. The injury was superimposed on preexisting degenerative arthritic changes in the lumbar spine.

Dr. Deer completed a diagnosis update on January 4, 2017, in which he requested that lumbar spondylosis without myelopathy and lumbar radiculopathy be added to the claim. He stated that the request was based on his findings of loss of normal lumbar lordosis, lumbar facet joint tenderness, abnormal range of motion, and muscle spasms. The claims administrator denied the addition of lumbar spondylosis without myelopathy and lumbar radiculopathy to the claim on April 17, 2017.

In a May 25, 2017, letter, Dr. Deer stated that Mr. Nibert suffers from lumbar spondylosis, which is symptomatic secondary to his work condition. He stated that he has intermittent leg pain consistent with lumbar radiculitis. He also has numbness and weakness. Dr. Deer asserted that Mr. Nibert developed lumbar disc disease from his working conditions, which led to lumbar radicular inflammation. He noted that the condition differs from radiculitis. He further stated that lumbar

spondylosis can be an arthritic condition but based on Mr. Nibert's work and injury, "a symptomatic component of his spondylosis in my opinion would be compensable at this time."

The Office of Judges affirmed the claims administrator's denial of the addition of lumbar spondylosis without myelopathy and lumbar radiculopathy to the claim in its August 20, 2018, Order. It found that Drs. Deer and Hess opined that Mr. Nibert sustained lumbar radiculopathy as a result of the compensable injury. The Office of Judges concluded that Dr. Hess's opinion should be given less weight as it was not accompanied by any specific medical findings. Dr. Deer's opinion was also found to be unpersuasive. In his May 26, 2016, treatment note, Dr. Deer stated that straight leg raise was negative and neurological examination showed no numbness in the legs. The only potentially positive finding for lumbar radiculopathy was abnormal bilateral knee and ankle jerk reflexes.

The Office of Judges concluded that the opinions of Dr. Walker, a neurologist, and Dr. Landis, an orthopedic surgeon, were the most persuasive of record. Dr. Walker's examination was four months before Dr. Deer's. Dr. Walker found normal leg raise, motor strength, and deep tendon reflexes. He diagnosed spinal stenosis, spondylosis, and degenerative disc disease. Dr. Landis examined Mr. Nibert one month after Dr. Walker and also found no evidence of lumbar radiculopathy. Leg raise, motor strength, and deep tendon reflexes were all normal. Dr. Landis diagnosed lumbar sprain/strain as a result of the compensable injury. The Office of Judges noted that Dr. Grace found numbness, tingling, and paresthesia in his August 26, 2016, examination; however, he did not diagnose radiculopathy. The Office of Judges concluded that even if Mr. Nibert has lumbar radiculopathy, it is not related to the compensable injury. The Office of Judges held that a preponderance of the evidence indicates lumbar radiculopathy should not be added to the claim.

In regard to lumbar spondylosis, the Office of Judges concluded that a preponderance of the evidence establishes that the condition is not related to the compensable injury. It concluded that the osteoarthritic pathology seen on the December 14, 2015, MRI preexisted the compensable injury. Dr. Landis opined that the compensable injury resulted in a lumbar sprain/strain that was superimposed on preexisting degenerative arthritic changes. His opinion was found to be the most reliable of record. Dr. Deer opined in his May 25, 2017, letter that Mr. Nibert developed disc disease as a result of his working conditions, and this led to lumbar radicular inflammation. He further stated that Mr. Nibert's spondylosis is based on his vocation, work, and injury. Since Dr. Deer opined that his past work history played a large role in his lumbar symptoms, the Office of Judges found that Mr. Nibert's lumbar spondylosis and radiculopathy cannot be said to have resulted from a single compensable injury. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on August 20, 2018.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. A preponderance of the evidence shows that even if Mr. Nibert does suffer from lumbar radiculopathy, it is not related to the compensable injury. Further, lumbar spondylosis is a degenerative condition, and the evidence indicates that it is preexisting and unrelated to the compensable injury.

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