

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

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

**MARDO MASONRY, INC.,
Employer Below, Petitioner**

vs.) No. 18-0896 (BOR Appeal No. 2052921)
(Claim No. 2017029088)

**KEVIN BENNETT,
Claimant Below, Respondent**

MEMORANDUM DECISION

Petitioner Mardo Masonry, Inc., by Counsel Toni J. Williams, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Kevin Bennett, by Counsel Reginald D. Henry, filed a timely response.

The issue on appeal is compensability. The claims administrator rejected the claim on July 3, 2017. The Office of Judges reversed the decision in its April 25, 2018, Order and held the claim compensable for left-shoulder strain. The Order was affirmed by the Board of Review on September 21, 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. Bennett, a mason, alleges that he injured his left-shoulder in the course of his employment on December 7, 2016. Mr. Bennet has a history of left shoulder problems predating the injury at issue. An October 23, 2015, treatment note by Mark Wantz, M.D., indicates Mr. Bennett was seen for his lumbar spine, at which time he also reported left-shoulder pain. He stated that he had an MRI eight years prior that showed an annular tear. Mr. Bennett declined surgery at that time. He still had pain with movement. On February 9, 2016, Mr. Bennett again reported left-shoulder pain. He informed Dr. Wantz that he did not want to proceed with an orthopedic referral or surgery at that time because he could not afford it. On July 11, 2016, it was noted that he had moderate, chronic, left-shoulder pain that was worsening. On November 14, 2016, Mr. Bennett

reported bilateral-shoulder pain. Dr. Wantz told him that he had a rotator-cuff injury but Mr. Bennett again denied a referral to orthopedics.

Mr. Bennett sought treatment from Dr. Wantz following the injury at issue. On December 15, 2016, Dr. Wantz noted that Mr. Bennett is a brick layer who injured his left-shoulder while laying blocks the week prior. He recommended an MRI to check for a suspected rotator-cuff tear. On January 17, 2017, Dr. Wantz stated in a letter that Mr. Bennett was unable to work until his suspected rotator cuff injury could be resolved. Mr. Bennett was seen by Nassem Beauchman, M.D., a surgeon, on February 13, 2017. Dr. Beauchman noted that Mr. Bennett had left-shoulder pain and muscle weakness. Physical therapy had not helped. Dr. Beauchman assessed left-shoulder rotator-cuff tear versus labral injury. A left-shoulder MRI was performed on March 27, 2017, and showed a partial thickness tear of the distal supraspinatus tendon. Dr. Beauchman performed left-rotator-cuff surgery on April 26, 2017. The pre- and post-operative diagnoses were left-shoulder impingement and left-shoulder-biceps tendonitis.

The Employer's Report of Occupational Injury, completed on May 17, 2017, indicates Mr. Bennett reported that he was injured on December 7, 2016, while laying blocks. The injury was described as a left-shoulder strain. The employer questioned the injury because it suspected that Mr. Bennett had previously injured his left shoulder. In an addendum, the employer noted that Mr. Bennett did not complete an onsite injury report, quit coming to work, and did not notify his jobsite foreman of his injury. The Employees' and Physicians' Report of Injury was completed on May 23, 2017, and indicates Mr. Bennett injured his left shoulder while lifting blocks. The physician's section was completed by Dr. Wantz and listed the diagnosis as rotator-cuff injury.

In a May 26, 2017, recorded statement, Mr. Bennett alleged that he reported his injury to his foreman, Paul Giles, right after it happened. Mr. Bennett stated that he had injured his shoulders in the past but that a few days of rest fixed the problem. He also stated that he told the shop steward, Glenn Patterson, about his injury. Mr. Patterson also gave a recorded statement and said that he worked with Mr. Bennett on the day of the alleged injury. They were laying eighty-pound blocks at the time. He stated that he could tell Mr. Bennett was hurting when they were working. On the way home, he told Mr. Patterson that he had pulled something in his shoulder and was going to take a few days off of work to recover. Mr. Bennett did not return to work after that. Stanley Bayne also gave a recorded statement and indicated that he worked with Mr. Bennett on the date of the alleged injury. They were laying blocks when Mr. Bayne noticed Mr. Bennett grimacing. He asked if he was alright and Mr. Bennett stated that he had injured his shoulder that day. Mr. Bayne stated that Mr. Bennett finished the work for the day using only his right arm and told him that he was not returning to the job the next day. Lastly, Paul Giles, indicated in his statement that he was Mr. Bennett's foreman. He reported that he was not informed that Mr. Bennett injured himself until six months after the injury allegedly occurred.

Mr. Bennett returned to Dr. Wantz on August 7, 2017. His treatment note indicates Mr. Bennett had returned to work. It was noted that he still had some left-shoulder pain. In a September 11, 2017, letter, Dr. Wantz stated that the left-shoulder MRI showed a tear of the distal supraspinatus tendon. He opined that the tear most likely happened in December of 2016, when

Mr. Bennett was laying brick at work. He admitted that he had not reviewed any of the operative notes from the shoulder surgery.

D. Kelly Agnew, M.D., performed a record review on December 29, 2017, in which he found that Mr. Bennett complained of shoulder pain prior to the December 7, 2016, injury. Mr. Bennett reported shoulder pain to several doctors, including Dr. Wantz, who diagnosed a rotator-cuff injury. Dr. Agnew noted that Mr. Bennett was examined on December 15, 2016, and showed no pain in the left shoulder. He was able to fully move his left-shoulder. The MRI findings were determined to be chronic in nature. Finally, there was no rotator-cuff injury seen during the left-shoulder arthroscopic surgery. Dr. Agnew concluded that Mr. Bennett did not sustain a left-shoulder injury on December 7, 2016.

The claims administrator rejected the claim on July 3, 2017. The Office of Judges reversed the decision and held the claim compensable for left-shoulder strain in its April 25, 2018, Order. It found that the evidentiary record was consistent as to the mechanism of injury. Mr. Bennett reported each time that he injured his left shoulder while lifting a block. Mr. Bayne saw him finish out the work day using only his right arm. Mr. Patterson stated that he could tell Mr. Bennett was in pain. The Office of Judges found that Mr. Bennett informed his supervisor, Paul Giles, of his injury the day that it occurred. This was supported by statements from Mr. Bennett, Mr. Bayne, and Mr. Patterson, as well as the Employees' Report of Injury. The Office of Judges therefore found that Mr. Bennett established that he sustained an injury in the course of his employment.

The Office of Judges next determined that Dr. Wantz is in the best position to assess Mr. Bennett's work-related injury because he is the treating physician and treated him both before and after the injury. The Office of Judges noted that Mr. Bennett testified in a deposition that he has had pain in both shoulders off and on over the years. Prior to the injury at issue, he could perform his job duties despite having some tenderness and pain in his left shoulder. After the injury, he was unable to work. The Office of Judges found that prior to the injury, Dr. Wantz documented left shoulder pain and tenderness but that Mr. Bennett had full range of motion. After the injury, he had significantly reduced range of motion and more severe pain. Dr. Wantz's finding of limited range of motion was supported by physical therapy notes which found Mr. Bennett's range of motion was half of what is normal. The Office of Judges therefore found that Mr. Bennett suffered a discrete new injury to his left shoulder.

The Office of Judges found that at the time of his initial evaluation, Dr. Wantz diagnosed left-shoulder-joint strain with possible disorder of the rotator cuff. Though an MRI showed a rotator-cuff tear, when Mr. Bennett underwent surgery, no such tear was found. The Office of Judges concluded that the claim should be held compensable for a left-shoulder strain. Regarding Dr. Agnew's record review, the Office of Judges found that the report was less reliable than the opinion of Dr. Wantz. Dr. Agnew merely performed a review of the records and did not physically examine Mr. Bennett. Also, he relied on records between September of 2011 and March of 2015 that reference shoulder pain; however, the records do not specify which shoulder and were not introduced into the evidentiary record. Dr. Agnew also failed to consider Dr. Wantz's findings of limited range of motion post injury and Dr. Beauchman's findings of severe pain and muscle weakness on February 13, 2017, which significantly differed from the preinjury symptoms. The

Office of Judges therefore concluded that Mr. Bennett sustained a left-shoulder strain in the course of and resulting from his employment. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on September 21, 2018.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Though Mr. Bennett clearly experienced shoulder pain prior to the compensable injury, his left-shoulder symptoms greatly increased after the December 7, 2016, injury. He experienced increased pain and a 50% reduction in his range of motion. A preponderance of the evidence indicates he sustained a left-shoulder strain in the course of his employment.

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 John A. Hutchison

DISSENTING:

Justice Evan H. Jenkins