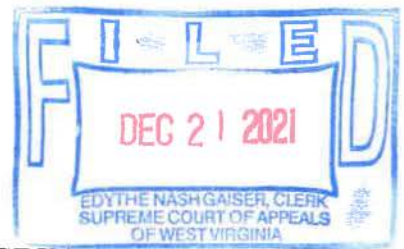


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SUPREME COURT NO. 21-0970

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

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DOSS ENTERPRISES, LC,

PETITIONER,

SUPREME COURT NO.: 21-0970

APPEAL NO.: 2056600

v.

JCN: 2021012556-INJ

DOI: 12/09/2020

PATRICK CASE,

RESPONDENT.

RESPONSE OF PATRICK CASE, RESPONDENT, TO
EMPLOYER'S PETITION FOR APPEAL

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PATRICK CASE,

RESPONDENT.

FROM THE WEST VIRGINIA WORKERS'
COMPENSATION BOARD OF REVIEW

RESPONSE OF PATRICK CASE, RESPONDENT, TO
EMPLOYER'S PETITION FOR APPEAL

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA:

I.

NATURE OF CASE AND TYPE OF PROCEEDING

This claim is pending before this Honorable Court upon the Petition for Appeal filed by the employer, Doss Enterprises, LC, from the West Virginia Workers' Compensation Board of Review order dated October 26, 2021, which reversed the Workers' Compensation Office of Judges' decision dated April 7, 2021. The Office of Judges' decision had affirmed four (4) Orders of the Claims Administrator, all dated December 22, 2020, which had rejected Mr. Case's claim, and denied the requests for orthopedic appointment, a custom molded clamshell right leg brace, and surgery to repair the right quadriceps tendon rupture. The West Virginia Workers' Compensation Board of Review reversed the decision of the Office of Judges and held this claim compensable, directed that the claimant, Patrick Case, be authorized to obtain an orthopedic appointment, a custom molded clamshell right leg brace, and be authorized for surgery to repair the right quadriceps tendon rupture he sustained in his work injury of December 9, 2020. Your respondent, Patrick Case, respectfully asserts that the West Virginia Workers' Compensation Board of Review's order dated October 26, 2021, is clearly correct based upon the evidence of record, and the law applicable thereto, and he respectfully prays that this Honorable Court will affirm the October 26, 2021 West Virginia Workers' Compensation Board of Review Order in its entirety.

II.

STATEMENT OF FACTS

Patrick Case was employed as a CDL Driver by Doss Enterprises LC, working for them for approximately seven (7) years at the time of his accident on December 9, 2020. As is recorded on the Doss Enterprises LC "Incident Form" provided by Doss Enterprises LC, and completed on the date of injury, Mr. Case was working as a truck driver hauling asphalt from the

JF Allen-Saltwell Plant at 5856 Saltwell Road, Bridgeport, WV 26330 and sustained a fall down steps at approximately 9:40 a.m. The accident was reported to the supervisor, Adam Stark, approximately six (6) minutes later at 9:46 a.m.

The accident was described on the Doss "Incident Form" as:

Employee was hauling asphalt for JF Allen-Saltwell plant on the day of injury. Plant has a catwalk installed to allow drivers to get to "higher ground" when spraying the asphalt from the bed of trucks. This catwalk has 10 stairs (including the catwalk itself). At the time of injury, the employee was descending the stairs from the catwalk after spraying off the bed. Employee stated that about halfway down the stairs he felt a sharp pain in his right knee. Upon feeling the pain in his knee, he stopped. When he began to continue his descent, he fell down the remainder of the stairs landing at the bottom. Employee stated that when he began to move again, he could not feel his leg under him, that it was as if it was not there.

Mr. Case was taken by ambulance to the United Hospital Center Emergency Department directly from the JF Allen-Saltwell plant following his work accident. The HPI section of the hospital note from his Emergency Department visit stated that Mr. Case arrived at the ER alone, and that his history presented no limitations. The Provider Note specifically states, "The patient was at work approximately 30 minutes ago when his R knee gave out and he fell down 4-5 steps causing him to hit the L side of his head on a railing [. . .]" While at the Emergency Department Mr. Case underwent a CT scan of his right knee without contrast. That scan was interpreted as "Suspect at least partial thickness tear of the quadriceps tendon. Also suspect partial or complete tear of the medial patellar retinaculum with significant soft tissue swelling and hematoma in the anterior knee joint area. No fracture seen." The Provider Note also documented that there was a consultation with Dr. Courtney, Orthopaedics, who recommended a knee immobilizer, partial weight bearing, follow-up as an outpatient. Mr. Case was advised to follow-up with UHC Orthopaedics and Sports Medicine. He was seen the following day (December 10, 2020) at UHC Orthopaedics and Sports Medicine by Justin Brewer, PA-C. In the Office Visit note from that

date, under History of Present Illness, it is noted that “Patrick D. Case is a 41-y. o. male. Comes to the office for initial consultation in regards to a right knee injury. This is a work-related injury.” It states that Mr. Case has no history of surgical procedures. In addition, it was charted that Dr. Peter Alasky had performed an ultrasound diagnostic study of the right knee on December 10, 2020, which found the patient did have a full thickness tear of the right quadriceps tendon with 2 cm of retraction.

Based upon the evaluation of December 10, 2020, it was determined that surgical repair was necessary. PA-C Brewer noted that Dr. Courtney also saw Mr. Case on this evaluation and examined Mr. Case with him. Dr. Courtney agreed with proceeding with surgery to repair the quadriceps tendon of the right knee. The surgery was scheduled for December 21, 2020, and Dr. Courtney recommended that Mr. Case have a custom-molded hinged clamshell type long-leg brace. PA-C Brewer referred Mr. Case to Morgantown Orthotics with a prescription to have this completed. He also placed Mr. Case in a long-leg splint with extra padding throughout the foot, heel, and proximal fibular head on December 10, 2020.

By four (4) orders of the Claims Administrator dated December 22, 2020, the compensability and treatment of Mr. Case’s December 9, 2020 work injury were all denied. The order denying compensability stated that Mr. Case did not sustain an injury in the course of and resulting from his employment, noting that “Based on all information obtained in our investigation no isolated, fortuitous event occurred causing injury.”

Timely protest to all four orders was made, and the litigation of those orders followed. Patrick Case testified at deposition in this claim on February 1, 2021. In the course of his testimony Mr. Case asserted that he had never experienced any type of problem with his right knee prior to December 9, 2020. He further testified that he was able to go up the stairs to the

platform, and rinse out his truck bed without any problem. He went on to testify that as he came back down the steps,

I just don't know what happened. I fell and when I fell my leg ended up underneath of me. And I'm assuming that's when the tendon ruptured. I had to have them to pick me up and sit me back on the stairs because I couldn't walk after that happened. I had no use of my right leg.

Mr. Case clearly described the sequence of having no issue involving the use of his right knee climbing up the steps to the platform, and no problems performing his job activities while on the platform, then falling on the way down the steps, with the resultant damage to his right knee. Mr. Case's testimony regarding his mechanism of injury is unrebutted. The ruling Administrative Law Judge, in the April 7, 2021 decision, determined that,

In this case, the claimant injured himself in the course of employment. Therefore, the only issue is whether his injury was incurred as a result of his employment. The claimant testified that on the day of injury, he put the material into the bed of the dump truck and then, in the course of coming back down the steps, he said he did not know what happened, but he fell, and his right leg ended up underneath of him. Although the Court in Cox, Id., found that the Workers Compensation is a no-fault system, the claimant was simply descending stairs. This claim is very similar to Dunn, Id., because there is no evidence that his work either caused or contributed to the injury. The injury could have happened anywhere at any time. It was idiopathic in nature.

Your claimant and Respondent, Patrick Case, respectfully asserted that the only reason he was up those stairs, on that platform, performing work for his employer, was because he was required to perform those tasks in fulfillment of the duties of his employment. Subsequently, he was further required to come back down those same stairs in order to continue his work activity to enter and operate his truck. The sole and only reason he was on the catwalk and stairs was to perform duties unique to his employment. To suggest that "The injury could have happened anywhere at any time" ignores the reality of how his accident occurred. There is nothing in the record to suggest that Mr. Case would have been otherwise similarly situated except to perform his job duties.

The Workers' Compensation Board of Review reversed the Administrative Law Judge decision of April 7, 2021 in its entirety, finding that it was "affected by error of law and clearly wrong in light of the reliable, probative and substantial evidence on the whole record". The West Virginia Workers' Compensation Board of Review directed that his claim be held compensable, that he be granted authorization for a leg brace, that his right quadriceps tendon full thickness tear be recognized as compensable, that repair of that injury be authorized, and that his evaluation and treatment by an orthopaedic surgeon be authorized. It further directed that Mr. Case's claim be remanded to the Claims Administrator with instruction to issue a protestable order addressing his entitlement to temporary total disability benefits, consistent with the Board's order.

III.

BASIS FOR AFFIRMING BOARD OF REVIEW'S ORDER

The West Virginia Workers' Compensation Board of Review's order of October 26, 2021 was clearly correct in reversing the Administrative Law Judge's decision of April 7, 2021, which had affirmed four (4) Orders of the Claims Administrator all dated December 22, 2020, which had rejected Mr. Case's claim, and denied requests for authorization for an orthopedic appointment, a custom molded clamshell right leg brace, and surgery to repair the right quadriceps tendon rupture. The Board of Review was further correct in directing that Mr. Case's claim be remanded to the Claims Administrator with instruction to issue a protestable order addressing his entitlement to temporary total disability benefits based upon the totality of the evidence properly of record in this claim, and the law applicable thereto.

IV.

POINTS OF LAW AND CITATIONS OF AUTHORITY

- 1) In order for a claim to be compensable, three elements must coexist: (1) a personal injury; (2) received in the course of employment; (3) resulting from employment.

Breeden v S.W.C.C., 168 W. Va. 537, 258 S.E.2d 398 (1981)

Barnette v. W.C.C., 153 W. Va. 796, 172 S.E.2d 698 (1979)

- 2) The Claims Administrator is required to provide reasonable and necessary treatment, health care, or healthcare goods and services.

West Virginia Code §23-4-3 and 85 CSR 20

- 3) The Board of Review shall reverse, vacate, or modify the order or decision of the administrative law judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge's findings are:

1. In violation of statutory provisions; or
2. In excess of the statutory authority or jurisdiction of the administrative law judge; or
3. Made upon unlawful procedures; or
4. Affected by other error of law; or
5. Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; [. . .]
6. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion

West Virginia Code §23-5-12(b)

- 4) If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.

West Virginia Code §23-4-1g(a).

V.

ARGUMENT

Patrick Case has been employed as a CDL Driver with Doss Enterprises LC for approximately seven (7) years at the time of his accident on December 9, 2020. As is recorded on the Doss Enterprises LC “Incident Form”, provided by Doss Enterprises LC, and completed on the date of injury, Mr. Case was working as a truck driver, hauling asphalt from the JF Allen-Saltwell Plant at 5856 Saltwell Road, Bridgeport, WV 26330 on December 9, 2020. On that date he sustained a fall down steps at that location at approximately 9:40 a. m., in the course of and resulting from his work activity. The accident was reported to Mr. Case’s supervisor, Adam Stark, approximately six (6) minutes later, at 9:46 a. m. This accident was documented on the Doss “Incident Form” as:

Employee was hauling asphalt for JF Allen-Saltwell plant on the day of injury. Plant has a catwalk installed to allow drivers to get to “higher ground” when spraying the asphalt from the bed of trucks. This catwalk has 10 stairs (including the catwalk itself). At the time of injury, the employee was descending the stairs from the catwalk after spraying off the bed. Employee stated that about halfway down the stairs he felt a sharp pain in his right knee. Upon feeling the pain in his knee, he stopped. When he began to continue his descent, he fell down the remainder of the stairs landing at the bottom. Employee stated that when he began to move again, he could not feel his leg under him, that it was as if it was not there.

“In order for a claim to be compensable, three elements must coexist: (1) a personal injury; (2) received in the course of employment; (3) resulting from employment.” Breeden v S.W.C.C., 168 W. Va. 537, 258 S.E.2d 398 (1981), Barnette v. W.C.C., 153 W. Va. 796, 172 S.E.2d 698 (1979). This report, completed by the employer, clearly demonstrates that Mr. Case is their employee, that he was performing necessary duties of his employment at the time of his injury, and that he suffered a work injury in the course of and resulting from that work activity..

The importance of the location and description of injury given by Mr. Case cannot be

overstated, and they are both wholly un rebutted. He walked up and down a stairway to a catwalk for the sole and exclusive purpose of spraying out the dump bed of his truck, as directed by his employer. This activity is not a “could have happened anywhere at any time” type of event. All of his actions and activities were mandated by his job. His actions, and the mechanism of injury, are un rebutted.

Mr. Case testified at deposition on February 1, 2021. In the course of his testimony, he described precisely how his accident occurred. He stated that he went up the steps to a platform, without any limitations, proceeding to perform the job of spraying out the dump bed. He then began to come back down the steps to return to his truck. In the course of coming down the steps, Mr. Case testified,

I just don't know what happened. I fell and when I fell my leg ended up underneath of me. And I am assuming that's when the tendon was ruptured. I had to have them to pick me up and sit me back on the stairs because I couldn't walk after that happened. I had no use of my right leg.

He further noted,

I fell down to the ground behind my truck. And that's whenever everybody seen me and they came and, you know, helped me get up and—because it was cold that day and they helped me get up off the ground and sat me on the stairs and I just fell down, because I told them I couldn't walk. Because like I said, I had no use of my right leg after that, and still don't right now.

Mr. Case went on to confirm that it was his right leg that was “underneath him” when he landed on the ground, stating that “when I landed, I was laying on my left side with my right leg, you know, back under me. And that's when I realized that I couldn't move my leg [. . .]” Mr. Case was under oath and subject to cross-examination by employer's counsel in his deposition. His testimony is clear and direct as to how he was injured. To bring that mechanism of injury to a fine point, Mr. Case was 5' 10” and weighed 515 pounds at the time of his injury on December 9,

2020. He had performed his job duties for Doss for approximately seven (7) years at the time of his work injury on December 9, 2020.

The employer introduced multiple decisions from other claims, asserting that these decisions represented a precedent that the Office of Judges should follow. The decisions are in no way consistent with Mr. Case's manner or mechanism of injury. As is clear from his testimony and the medical record, Mr. Case had no pre-existing conditions related to his right knee, no limitations in terms of the performance his job duties, no prior medical treatment for his right knee, and was fully functional in all aspects prior to his injury. Subsequent to his injury, he was diagnosed as having a full-thickness tear of his quadriceps tendon of his right knee. His injury is entirely consistent with his description of how he was hurt at work. The judge was clearly wrong in affirming the rejection of this claim.

The Board's Order reversing the Administrative Law Judge decision was clearly correct, as it found the Administrative Law Judge decision of April 7, 2021 to be affected by error of law and clearly wrong.

The Board of Review shall reverse, vacate, or modify the order or decision of the administrative law judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge's findings are:

1. In violation of statutory provisions; or
2. In excess of the statutory authority or jurisdiction of the administrative law judge; or
3. Made upon unlawful procedures; or
4. Affected by other error of law; or
5. Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; [. . .]
6. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion

WVC §23-5-12(b). Here, the Board correctly applied the "clearly wrong" standard, and correctly concluded that the Administrative Law Judge's decision of April 7, 2021 was clearly wrong.

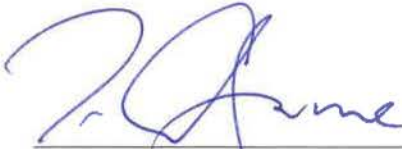
Patrick Case was performing his job in a manner that clearly establishes that he was not restricted or limited prior to his injury. The doctors who saw him at the Emergency Department at UHC, and at the Orthopaedic Surgery and Sports Medicine center at UHC both recognized the work relationship of Mr. Case's injury. "If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted." West Virginia Code §23-4-1g(a).

Insofar as Patrick Case was performing specific job-related tasks that resulted in his work injury, this event was in no manner something that "could have happened anywhere at any time." The reality is that it only occurred when and where it did because Mr. Case was required to be at that location, on those stairs, at the moment that he fell, and landed with his right leg trapped underneath him, resulting in a full-thickness tear of his right quadriceps tendon. "The Claims Administrator is required to provide reasonable and necessary treatment, health care, or healthcare goods and services." West Virginia Code §23-4-3 and 85 CSR 20. Mr. Case was denied reasonable and necessary treatment, health care and healthcare goods and services, all as a result of the wrongful denial of his West Virginia Workers' Compensation claim. He was forced to endure intense pain, physical limitations, loss of work activity, and resultant financial hardship, all due to the rejection of his claim. This injustice was corrected by Order of the Board of Review dated October 26, 2021, which reversed four (4) Orders of the Claims Administrator dated December 22, 2020.

VI.

PRAYER

WHEREFORE, your claimant and Respondent, Patrick Case, respectfully prays that this Honorable Court will AFFIRM the October 26, 2021 Order of the West Virginia Workers' Compensation Board of Review in its entirety.



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Respectfully submitted,
Patrick Case
By Counsel

CERTIFICATE OF SERVICE

I, T. Colin Greene, counsel for the Respondent, Patrick Case, do hereby certify that on this the 20th day of December, 2021, a copy of the foregoing Response of Patrick Case, Respondent, To Employer's Petition for Appeal was served upon Jeffrey B. Brannon, Esq., Counsel for the Employer and Petitioner, Doss Enterprises, LC.; Erie Insurance, Third-Party Administrator; and the West Virginia Workers' Compensation Board of Review, by depositing true copies thereof in the regular United States Mail, postage prepaid, and addressed to each of them at their last known address.



T. Colin Greene.
Counsel for Respondent