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

**DANNY E. VAUGHAN,**
**Appellant**

**v. No. 35746 (WCBOR, No. 2043268)**
**(Claim No. 2008003377)**

**WEST VIRGINIA OFFICE OF THE INSURANCE COMMISSION and ALFRED L. WICKLINE, Appellees**

**FILED**
**May 13, 2011**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

## MEMORANDUM DECISION

This matter is an appeal from an order of the West Virginia Workers' Compensation Board of Review ("BOR"), dated January 27, 2010, filed by the Appellant, Danny E. Vaughan ("Mr. Vaughan"). Mr. Vaughan contends that the BOR erred in holding that his claim was time-barred because he failed to report his claim within the six month statute of limitations period applicable to workers' compensation claims. For the reasons set forth in this Memorandum Decision, we agree.

### I.
### Factual and Procedural Background

On September 1, 2007, Mr. Vaughan, who is employed by Alfred L. Wickline, d/b/a Belinda's Flower's ("Employer"), was sent to a work site to prepare it for a wedding. The preparation included setting up flower arrangements, putting down aisle carpet and placing candle stands. During this preparation, Mr. Vaughan contends that he incurred pain in his back and legs while working. Mr. Vaughan continued his tasks and did not immediately report his injury to his employer. Later that evening, Mr. Vaughan asserts that he still had soreness and tenderness in his back. On September 6, 2007, Mr. Vaughan was seen at the Bluestone Medical Center. Its medical records reveal that Mr. Vaughan complained of "lower back pain which sometimes radiates to the right leg" and that he had been taking a medication which he stopped "because of muscle pain." On October 3, 2007, Mr. Vaughan was again seen at the Bluestone Medical Center for complaints of pain in the legs and lower back. On October 9, 2007, Mr. Vaughan received a MRI of the lumbar spine, which revealed that he had a prominent bulging disc that may be herniated. The MRI reports states

> [m]ost prominent bulging disc at L4-5, this is compressing the thecal sac on the ventral aspect.

> Asymmetric mild protrusion towards the right side[.] This could possibly represent sub-ligamentous disc herniation. Nerve root exiting through the intervertebral foramina itself appears unremarkable. Degenerative changes of the disc and minimal bulging at L3-4 and L5-S1. Otherwise unremarkable.

On March 3, 2008, the Employer completed an "Employer's Report of Injury," on the prescribed BI-3 form required by the Employer's workers' compensation insurance carrier, BrickStreet Mutual Insurance Company ("Brickstreet"). The Employer's Report of Injury followed an undated "Claimant's Report of Injury Telephone," which also appears to be on a form utilized by Brickstreet. The information in the Claimant's Report of Injury reflects that a telephone report was made by Mr. Vaughan to Brickstreet (who in addition to being the Employer's insurer is also the Employer's claims administrator). During the call to Brickstreet, Mr. Vaughan reported the details and circumstances of his September 1, 2007, injury. Mr. Vaughan also informed Brickstreet that he was still working, but had missed several days of work due to his injury and also that he had been undergoing physical therapy three times per week for two months.

On March 12, 2008, Brickstreet denied Mr. Vaughan's claim on the basis that his application for benefits had not been timely filed and that his injury was not a result of his employment with his Employer. Mr. Vaughan protested Brickstreet's denial and a review of the denial was conducted by the Workers' Compensation Office of Judges ("OOJ").[1] On June 23, 2009, the OOJ affirmed Brickstreet's decision. In affirming Brickstreet's decision, the OOJ concluded that Mr. Vaughan was required to file his claim of injury within six months of the date of injury and that the statute of limitations for reporting his claim expired on March 1, 2008 – 2 days prior to the date of the Employer's BI-3 Report of Injury. In addition to finding that Mr. Vaughan's claim was time-barred, the OOJ also ruled that the claim was not compensable because Mr. Vaughan had failed to demonstrate that his injury was work related.

Mr. Vaughan appealed the OOJ's decision to the BOR. By order dated June 23, 2009, the BOR affirmed the OOJ's ruling that Mr. Vaughan's claim was untimely filed; however, the BOR "modified" the OOJ's order to reflect that "the Board [did] not adopt the [OOJ's] findings and conclusions that relate to issues other than timeliness." Mr. Vaughan

[1]The Workers' Compensation Office of Judges is a part of the Office of the Insurance Commissioner of West Virginia.

has appealed the BOR's order to this Court, seeking reversal of the BOR's decision denying his claim.

## II.
## Discussion

Although there is uncertainty as to the exact date that Mr. Vaughan made his telephone report of injury to Brickstreet, there is no uncertainty that the Employer was made aware of Mr. Vaughan's injury claim on February 22, 2008, which was within the six month limitation period for Mr. Vaughan's claim.[2] Attached to the Employer's Report of Injury and submitted to Brickstreet was a typewritten letter signed by the Employer's accountant and manager ("Manager"). In that letter, the Manager states that Mr. Vaughan's injury "was brought to my attention on February 22nd when he [Mr. Vaughan] told us we have to fill out the [Workers'] Compensation papers as his back was not getting any better from the physical therapy that he had been taking." In *France v. Workmen's Compensation Appeal Board*, 117 W.Va. 612, 186 S.E. 601 (1936), we addressed a situation where an employee made a verbal report of injury to the Commissioner, and the employer had been made aware of a claim prior to the expiration of the applicable statute of limitations period, but the employer failed to report the claim before the limitations period expired. In reversing the Appeal Board in *France*, we found that:

> It does not appear that, either before or subsequent to the six months' expiration date, the commissioner or employer tendered to claimant a form upon which to make application. The employer had knowledge of the

[2] *W.Va. Code*, 23-4-15(a) [2010], provides as follows: To entitle any employee or dependent of a deceased employee to compensation under this chapter, other than for occupational pneumoconiosis or other occupational disease, the application for compensation shall be made on the form or forms prescribed by the Insurance Commissioner, and filed with the Insurance Commissioner, private carrier or self-insured employer, whichever is applicable, within six months from and after the injury or death, as the case may be, and unless filed within the six months period, the right to compensation under this chapter is forever barred, such time limitation being hereby declared to be a condition of the right and hence jurisdictional, and all proofs of dependency in fatal cases must also be filed with the commission within six months from and after the death. In case the employee is mentally or physically incapable of filing the application, it may be filed by his or her attorney or by a member of his or her family.

> alleged injury well within the period provided for reporting the same.

*Id*., 117 W.Va. at 614, 186 S.E. at 602.

The Employer admits that it was aware of Mr. Vaughan's claim on February 22, 2008, if not prior to that.[3] There is no evidence in the record that the "the [Workers'] Compensation papers" referenced in the Manager's letter were provided to Mr. Vaughan. Instead, Mr. Vaughan found it necessary to verbally report his claim on the eve of the expiration of the six month period for filing his claim.

In addition to the fact that the Employer knew of Mr. Vaughan's claim prior to the expiration of the statute of limitations period, yet failed to provide the required forms to Mr. Vaughan, we believe Brickstreet's "Claimant's Report of Injury Telephone" form, which we note contains sixty questions, excluding subparts, to be deficient. Some of the questions elicit information that are solely provided by a claimant, while other questions must be completed by a Brickstreet claim representative who takes a telephone report of the injury from a claimant. The telephone report form does not contain a place to record the date that a claimant called and reported his or her claim. The only space or question that comes close to eliciting that information is Question No. 60 – the very last question. Question No. 60 asks as follows: "Call Time". In Mr. Vaughan's case, Brickstreet noted the time as "12:00". The date of Mr. Vaughan's call was not noted by Brickstreet, and there is no time/date stamp on the form. Unlike the "Claimant's Report of Injury Telephone" form, the Employer's Report of Injury on form BI-3 does have a place for the date that, and in Mr. Vaughan's case the Employer's report is dated March 3, 2008 – two days after the expiration of Mr. Vaughan's six month reporting window.

Under the facts of this case, the contradictory evidence as to the date Mr. Vaughan made his telephone report of injury is of Brickstreet's making. The "Claimant's Report of Injury Telephone" is a computer generated form. This form notes the assigned claim number and also notes that a team has been assigned to the claim. The form does not contain, and does not even require, the actual date that the telephone report was taken. It requires the time of the called report, just not the date of the telephone call. Brickstreet should require that the date of a telephone report of a claim be recorded on the form. Brickstreet's argument that the date of Mr. Vaughan's telephone call is unknown also strikes this Court as disingenuous and convenient. It would be disconcerting, to say the least, that Brickstreet – a major player in the workers' compensation insurance market in our State –

---

[3]The Manager's letter seems to support the belief that she was aware, prior to February 22, 2008, that Mr. Vaughan was having physical problems.

was (is) unable to review its telephone records, internal computer records (e.g., of the employee who actually took Mr. Vaughan's call when he reported his claim), or even the claim numbers that were assigned to claims immediately before and after Mr. Vaughan's claim number (records in those claims might have been helpful in resolving the uncertainty), and clarify the issue in dispute. Brickstreet, as the claims administrator, had – and has – a duty to use its best efforts to determine the date that Mr. Vaughan called in his claim. The record does not show that such an effort was made.

Mr. Vaughan should not suffer the denial of his claim as a consequence of Brickstreet's failures. Mr. Vaughan also should not suffer a denial of his claim because of his Employer's failure to timely provide him with the required forms for making a claim.

The OOJ and BOR concluded that Mr. Vaughan reported his injury on March 3, 2008, and therefore that Mr. Vaughan failed to establish that he timely reported his claim. We disagree. In Syllabus Point 5 of *Bragg v. State Workmen's Compensation Commissioner*, 152 W.Va. 706, 166 S.E.2d 162 (1969), we held that "[w]hen it appears from the proof upon which the Workmen's Compensation Appeal Board acted that its finding was plainly wrong an order reflecting that finding will be reversed and set aside by this Court." *See also Davies v. West Virginia Office of Insurance Commissioner*, ___ W.Va. ___, ___, ___ S.E.2d ___, ___ (No. 35550, April 1, 2011)(Slip Op., at 5). The BOR was "plainly wrong" to find that Mr. Vaughan's claim was reported on March 3, 2008, as opposed to February 22, 2008, the latter date being within the statute of limitations period. Brickstreet, as the claims administrator and insurer, may not create uncertainties in a record and then fail to try and clarify those uncertainties to the prejudice of a claimant where it clearly has the ability and information needed to resolve the issue. Brickstreet clearly had the ability to record the date of Mr. Vaughan's telephone report.

## III.
## Conclusion

We find that the Workers' Compensation Board of Review was plainly wrong in ruling that Mr. Vaughan's claim was time-barred and we remand this matter with directions that the Board of Review enter an order finding Mr. Vaughan's claim to have been timely filed and for further proceedings consistent with this Memorandum Decision.[4]

---

[4]While the parties brief the issue of the compensability of Mr. Vaughan's claim, that issue is not presently before the Court. In its January 27, 2010, order affirming the OOJ's decision on the issue of timeliness, the Board of Review also specifically held that it did "not adopt the Administrative Law Judge's findings and conclusions that relate to issues other

Reversed and Remanded.

**Issued**: May 13, 2011

**Concurred in by**:

Chief Justice Margaret L. Workman
Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

---

than timeliness." The Board of Review further stated that:

> The final order of the Workers' Compensation Office of Judges dated June 23, 2009, is MODIFIED to reflect that the claim is denied because it was not timely filed. (Emphasis in original).

Because the issue of compensability has not been decided by final order below, we decline to address it in the present appeal.