

BEFORE THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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STEVEN M. KITTLE,

PETITIONER,

v.

ACNR RESOURCES, INC.,

RESPONDENT.

APPEAL NO.: 2058201

JCN: 2022006519

DOI: 09/29/2021

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BRIEF ON BEHALF OF PETITIONER

STEVEN M. KITTLE

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(March 30, 2017)

STATUTES

West Virginia Code §23-5-12(b)  
West Virginia Code §23-4-1g(a)

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STEVEN M. KITTLE

I.

STATEMENT OF THE CASE

This claim comes before the Intermediate Court of Appeals of West Virginia upon the appeal of your claimant and Petitioner, Steven M. Kittle, to the decision of the West Virginia Workers' Compensation Board of Review dated September 27, 2022, which affirmed a decision of the Workers' Compensation Office of Judges dated April 1, 2022, which affirmed an order by the Claims Administrator dated October 7, 2021, rejecting his claim. Your claimant and Petitioner, Steven M. Kittle, respectfully asserts that the order of the West Virginia Workers' Compensation Board of Review, dated September 27, 2022, is clearly wrong in light of the reliable, probative and substantial evidence on the whole record.

## II.

### STATEMENT OF FACTS

Steven M. Kittle sustained injury to his left foot in the course of and resulting from his employment with ACNR Resources, Inc. (hereinafter, ACNR) on September 29, 2021, while engaged in assigned work activity, relocating fans in a shower house at work. While performing this duty of his employment, he felt a pop or crack sensation in his left foot and developed the sudden onset of pain accompanied by difficulty walking. He was examined at MedExpress Glen Dale on September 30, 2021, where painful ranges of motion and difficulty bearing weight were noted. X-rays were performed, and interpreted to show no fracture. He completed an Employees' and Physicians' Report of Occupational Injury or Disease the same day, stating that he injured his left foot while walking in a shower house and moving fans. The Physicians' portion of this report was completed stating that he had an occupational injury, a left foot sprain.

He returned to MedExpress on October 7, 2021 reporting left foot swelling and pain with weight bearing. Examination revealed reduced range of motion, swelling at the metatarsals, tenderness, and intermittent numbness. He was again diagnosed with a left foot sprain, referred for a left foot MRI, and prescribed crutches. By Order of the Claims Administrator dated October 7, 2021, Mr. Kittle's claim was rejected, the order stating that he "did not sustain an injury in the course of and as a result of employment."

Mr. Kittle was seen and treated by Dr. Fijalkowski, Doctor of Podiatric Medicine, on October 19, 2021, regarding his left foot pain. Dr. Fijalkowski wrote that he "was at work and heard something pop." Mr. Kittle reported severe left foot pain, and Dr. Fijalkowski noted swelling in Mr. Kittle's left foot. Dr. Fijalkowski reviewed the x-rays taken at MedExpress from September 30, 2021, which he noted were non-weight-bearing, and therefore ordered weight-bearing x-rays which revealed a subacute fracture at the fourth metatarsal. Dr. Fijalkowski diagnosed a closed, non-displaced fracture of the

fourth metatarsal of the left foot and left foot pain. He prescribed a CAM walker boot.

Mr. Kittle testified at a deposition held on December 14, 2021. He stated that one of the duties of his job was to dry the floor of the shower house. He stated that he had to move the floor-drying fans around the floor area before the next shift came in to use the shower house. He stated,

I was in the process of moving one of the fans. I moved the fan and headed towards the next fan and before I got to the [. . .] last fan I took a step and felt something in my foot that felt to me like some sort of tear or, you know, a pull or rip. And I knew that something happened that wasn't, you know, wasn't normal.

He testified that drying the floors involved moving eight fans, and that after the sudden onset of his foot pain, he sat in a chair for approximately 20 minutes before returning to his duties. He stated that when he returned to his duties, he had to brace himself against a wall as he walked to reduce the weight on his injured left foot. He testified that the employer's safety personnel recommended that he visit the emergency room for this incident, but that he tried to avoid that and went home. When he awoke the next morning, his left foot was swollen and he sought medical attention. At the time of his deposition, Mr. Kittle was scheduled for a follow up with Dr. Fijalkowski in one week at which time he would determine whether Mr. Kittle could return to work. He stated that his foot remained painful and swollen, but noted that the swelling had somewhat reduced since the time of his injury. Lastly, Mr. Kittle noted that a coworker who performs the same job tasks wears a pedometer/step-counter, and walks approximately 14,000 to 15,000 steps per day.

On April 1, 2022, the Administrative Law Judge affirmed the Claims Administrator's October 7, 2021 rejection of Mr. Kittle's claim. The Judge found the fact that Mr. Kittle was "simply walking" and had stated that he "did not slip or trip" had proved that his injury "could have occurred any place, including while not working." The Judge therefore stated that while Mr. Kittle had sustained his injury "during the course of" his employment, he had not sustained his injury "as a result of work", and therefore was not entitled to his benefits. On September 27, 2022, the West Virginia Workers'

Compensation Board of Review affirmed the Administrative Law Judge's October 7, 2021 decision.

Your Petitioner respectfully pursues his appeal to this Honorable Court.

### III.

#### POINTS OF LAW AND CITATIONS OF AUTHORITY

- 1) 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)

- 2) 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)

- 3) As a matter of law, the Court has found that activities performed in the furtherance of an employee's work duties, are "in the course of and resulting from employment."

Cox v. Fairfield Inn, Memorandum Decision No. 14-0871 (June 16, 2015)

- 4) In determining whether an injury resulted from a claimant's employment, a causal connection between the injury and employment must be shown to have existed.

Emmel v. State Comp. Dir., 150 W.Va. 277, 145 S.E. 2d 29 (1965)

- 5) The proof required to establish the compensability of a workers' compensation claim is sufficient evidence to make a reasonable person conclude that the injury occurred while performing the duties of employment.

Ramey v. S.C.C., 150 W. Va. 402, 146 S.E. 2d 479 (1966)

Machala v. S.C.C., 109 W. Va. 413, 155 S.E. 2d 169 (1930)

- 6) An injury which developed over a period of time and did not occur as a result of a single, isolated trauma, is a personal injury under workers' compensation.

Lilly v. S.W.C.C., 159 W. Va. 613, 725 S.E. 2d 214 (1976)

- 7) 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)

- 8) Without probative evidence to the contrary, credible evidence demonstrating an injury, incurred while walking down a set of stairs merely upon arrival at work, is sufficiently work-related to be compensable.

Greenbrier Hotel Corporation v. Gerson D Gutierrez, Memorandum Decision No. 16-0507 (March 30, 2017)

#### IV.

#### ARGUMENT

Steven M. Kittle is an employee of ACNR Resources, Inc. who suffered a fracture to the fourth metatarsal on the bottom of his left foot in the course of and resulting from his employment with ACNR Resources, Inc. on September 29, 2021. At the time of his injury, Mr. Kittle was taking care of the shower house, moving large fans from one shower-room floor to the next (8 drying fans in use simultaneously) to relocate or reposition them—a duty of his employment—when he heard/felt a pop in

his left foot, accompanied by a “pulling” or “ripping” sensation. “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). Here, Mr. Kittle has clearly described an event occurring in the course or and resulting from his employment, as he was walking between fans seven (7) and eight (8) for the sole purpose of relocating them in the performance of his employment duties. He testified that bearing weight on his injured foot was very painful so he had to sit down after his injury, and that he braced himself against a wall in order to safely maneuver down the hallway once he got up and tried walking. He reported this injury to his employer’s safety personnel who recommended that he seek treatment at the emergency room, but Mr. Kittle attempted to work through his pain and then rest at home.

When Mr. Kittle awoke the next day, his pain persisted and he noted that he had developed swelling of his injury site, and sought treatment from MedExpress Glen Dale on September 30, 2021. He was seen by Megan Simpson, NP, who obtained non-weight bearing x-rays which caused her to misdiagnose his injury as a mere sprain of his left foot. An Employees’ and Physicians’ Report of Occupational Injury or Disease was completed at this evaluation, noting that Mr. Kittle had sustained an occupational injury and had not aggravated a prior injury or disease. He was released to return to work with modified duty. Despite this Report of Injury stating that Mr. Kittle had clearly sustained an injury in the course of and resulting from work efforts performed for his employer, Mr. Kittle’s claim was wrongly rejected by Order of the Claims Administrator on October 7, 2021, stating that “the mechanism of injury does not constitute a workers’ compensation injury.” This is clearly wrong, as walking is a necessarily required function in the performance of his occupational duties, he was absolutely unable to perform said duties without engaging in walking as he was at the time of his injury, and this isolated, fortuitous event clearly constitutes a workers’ compensation injury. “As a



matter of law, the Court has found that activities performed in the furtherance of an employee's work duties are 'in the course of and resulting from employment.'" Cox v. Fairfield Inn, Memorandum Decision No. 14-0871 (June 16, 2015). Here, walking from one fan to the next is a necessary function in the furtherance of Mr. Kittle's employment, as it is was only way for him to get from one fan to the next to perform his job duties. Therefore, the Claims Administrator's Order of October 7, 2021, rejecting his claim is clearly wrong.

When Mr. Kittle continued to experience pain and sought further treatment, he was seen and treated by Dr. Daniel Fijalkowski, Doctor of Podiatric Medicine (DPM) on October 19, 2021. Dr. Fijalkowski reviewed N.P. Simpson's treatment records and x-rays, and noted that the x-rays performed at that examination were non-weight bearing. Therefore, Dr. Fijalkowski had weightbearing x-rays performed, revealing a deformity at the fourth metatarsal "consistent with subacute fracture with healing in this area". He diagnosed a subacute fracture of the fourth metatarsal of Mr. Kittle's left foot. "In determining whether an injury resulted from a claimant's employment, a causal connection between the injury and employment must be shown to have existed." Emmel v. State Comp. Dir., 150 W.Va. 277, 145 S.E. 2d 29 (1965). Here, Mr. Kittle has testified under oath and subject to cross-examination that a duty of his employment is drying the shower house floors which involves moving fans, and that after he felt the pain in his foot, he had to rest in a chair for approximately 20 minutes before attempting to return to work. He stated that when he returned to his duties, he had to brace himself against a wall as he walked the hallways to reduce the weight on his injured left foot. "The proof required to establish the compensability of a workers' compensation claim is sufficient evidence to make a reasonable person conclude that the injury occurred while performing the duties of employment." Ramey v. S.C.C., 150 W. Va. 402, 146 S.E. 2d 479 (1966), Machala v. S.C.C., 109 W. Va. 413, 155 S.E. 2d 169 (1930). Here, Mr. Kittle has clearly and consistently described an isolated fortuitous event in which he was performing necessary job duties required of him by his employer, at

which time he sustained an injury, medically documented through x-ray imaging. Further, he has testified that his co-worker, who performs the same job duties, wears a pedometer while working and has recorded approximately 14,000 to 15,000 steps per day. “An injury which developed over a period of time and did not occur as a result of a single, isolated trauma, is a personal injury under workers’ compensation.” Lilly v. S.W.C.C., 159 W. Va. 613, 725 S.E. 2d 214 (1976). Prior to this injury, Mr. Kittle did not have any symptoms or limitations, and after this injury he was diagnosed with a broken metatarsal. A reasonable person would find a causal connection between Mr. Kittle’s employment and his work injury, and that Mr. Kittle’s injury was sustained in the course of and resulting from performing the duties of his employment.

Both Megan Simpson, NP, and Dr. Fijalkowski found injuries to Mr. Kittle’s left foot resulting from his work activity of September 29, 2021, and the Judge’s decision of April 1, 2022, is therefore clearly wrong, and goes directly against the holding in Cox v. Fairfield Inn, Memorandum Decision No. 14-0871 (June 16, 2015). In Cox, the Court held that Ms. Cox had sustained a compensable injury in the course of and resulting from her employment as a front desk clerk when she walked around the corner of a desk and twisted her ankle. The employer argued that her injury “could have occurred at any time or place and was not related to her employment.” The employer further argued that “she did not slip, trip, or fall due to objects in her path” and had merely been “injured while performing an activity incidental to everyday life.” The Court rejected this argument, finding that Ms. Cox had sustained a compensable injury because she was walking from the front of the desk to the back of the desk to perform her job duties. The Court stated, “The fact that she did not slip or trip is irrelevant to the issue of compensability.” The Court held similarly in Greenbrier, where it found that without probative evidence to the contrary, credible evidence demonstrating an injury, incurred while walking down a set of stairs merely upon arrival at work, is sufficiently work-related to be compensable.

Greenbrier Hotel Corporation v. Gerson D Gutierrez, Memorandum Decision No. 16-0507 (March 30,

2017). There, the Office of Judges weighed multiple factors, most directly related to the present case being that the evidentiary record contained medical imaging showing a plantar fascial tear; Mr. Gutierrez's treating physician indicated that his injury was occupationally-related; Mr. Gutierrez's testimony was opined to be credible; and the evidence of record failed to demonstrate that Mr. Gutierrez's right foot injury could be attributed to a non-work-related occurrence. Here, Mr. Kittle suffered an injury similar to the claimants in both Cox and Greenbrier. He injured his left foot in the course of and resulting from a routine activity intrinsically necessary to the performance of his employment, and therefore the facts align in a legally identical analysis. Mr. Kittle was walking from one job duty to another, for the sole purpose of performing duties directly related to his employment, and suffered a fractured fourth metatarsal in his left foot. The Administrative Law Judge wrongly affirmed the Claims Administrator's October 7, 2021 rejection of his claim.

Despite the clear findings of Dr. Fijalkowski, Podiatric Specialist, who identified a fractured metatarsal as the result of Mr. Kittle's occupational injury and the cause of his symptoms and limitations, and despite the clear holdings of both Cox and Greenbrier, the Administrative Law Judge opined that Mr. Kittle was "simply walking"; noted that he "was not carrying any materials"; and had "admitted that he did not slip or trip". Based upon this misanalysis, the Judge stated, "In other words, the claimant established that that he was injured in the course of employment; however, he did not establish by a preponderance of the evidence that he was injured as a result of employment." As demonstrated above, this holding is clearly wrong, and the Judge issued an erroneous decision in affirming the Claims Administrator's rejection of Mr. Kittle's claim.

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). Here, the Board of Review is clearly wrong in its analysis of the facts and the application of the established law in failing to reverse the Decision of the Office of Judges dated April 1, 2022. “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). The evidence of record shows that Mr. Kittle’s work injury occurred as he performed an integral part of a necessary function of his work duties, and therefore should be recognized as a compensable work injury.

V.

PRAYER

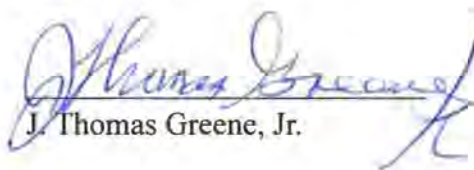
WHEREFORE, your claimant and Petitioner, Steven M. Kittle, respectfully prays that this Honorable Court reverse the decision of the West Virginia Workers’ Compensation Board of Review dated September 27, 2022, and hold his claim compensable for a subacute fracture at the fourth metatarsal; and for other such relief as is supported by competent medical evidence of record.

Respectfully Submitted,  
Steven M. Kittle  
By Counsel

  
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CERTIFICATE OF SERVICE

I, J. Thomas Greene, Jr., Counsel for the Petitioner, Steven M. Kittle, do hereby certify that on this, the 26th day of October, 2022, a true copy of the foregoing "Brief on Behalf of Petitioner, Steven M. Kittle" and an Appendix of relevant documents, were served upon Aimee M. Stern, Esq., Counsel for the Employer and Respondent, ACNR Resources, Inc., via File&ServeXpress.

  
J. Thomas Greene, Jr.