IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Charleston

STEVEN M. KITTLE,

Claimant/Petitioner,

v.

MARSHALL COUNTY COAL RESOURCES, INC.

Employer/Respondent

APPELLATE COURT NO: 22-ICA-204
JCN: 2022006519

FROM THE WORKERS' COMPENSATION BOARD OF REVIEW

EMPLOYER'S RESPONSE TO CLAIMANT'S PETITION FOR APPEAL

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POINTS AND AUTHORITIES RELIED UPON

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I. KIND OF PROCEEDING AND NATURE OF RULING

This claim comes before this Honorable Court pursuant to the Claimant's Petition for Appeal from the September 27, 2022 Order of the Worker's Compensation Board of Review (Exhibit A), which affirmed the Office of Judges' April 1, 2022 Order (Exhibit B) affirming the Claims Administrator's October 7, 2021 order which rejected the claim (Exhibit C).

II. STATEMENT OF FACTS

The Claimant/Petitioner, Steven Kittle, is employed at Marshall County Coal Resources, Inc. He presented to MedExpress on September 30, 2021, complaining of an injury to his left foot. He reported that he "was walking at work and felt a pain in left foot; patient reports felt like a pop or a crack, report after that he had to use assistance when walking." Mr. Kittle rated

his current pain as 7/10. On exam, MedExpress personnel found pain to the proximal toes/distal metatarsals in all five digits of the left foot. Range of motion was full but painful. Mr. Kittle also reported pain in the base of his toes with weight bearing and with palpation. A left foot x-ray performed at MedExpress documented no fracture. The radiologist noted that the metatarsal bases were not adequately seen, degenerative changes were present, mineralization was decreased, and calcaneal enthesophytic was noted at the insertion of the plantar fascia and Achilles tendon. MedExpress personnel diagnosed Mr. Kittle with unspecified sprain of the left foot. (See Exhibit D, 9/30/21 MedExpress progress note and x-ray report, filed by the Employer below.)

The Report of Injury was filed on September 30, 2021. Mr. Kittle described the mechanism of injury as "walking in shower house (was moving fans)." MedExpress Urgent Care personnel completed the healthcare provider's portion of the Report, listing the compensable diagnosis as left foot sprain. In response to the question "how did the injury occur?" MedExpress personnel stated, "walking." (See Exhibit E, 9/30/21 Report of Injury, filed by the Employer below.)

On October 7, 2021, the Claims Administrator issued the order in litigation, rejecting this claim on the basis that Mr. Kittle did not suffer an injury in the course of and resulting from his employment. (See Exhibit C, Claims Administrator's 10/7/21 order, filed by the Employer below.)

Mr. Kittle completed a Notice of Claim for Sickness and Accident Benefits on October 14, 2021. He described his sickness/accident as follows: "felt a pull or tear in left foot while walking (was moving fans at time)." (See Exhibit F, 10/14/21 Notice of Claim, filed by the Employer below.)

On October 19, 2021, Mr. Kittle saw a podiatrist, Dr. Danny Fijalkowski, at Wheeling Hospital. The reason for his visit is identified as "c/o left foot pain, was at work and heard something pop." Mr. Kittle reported that he had been walking on a flat surface when he felt a tear in his foot; he stated that he did not trip or fall. On exam, Dr. Fijalkowski found mild edema to the dorsal foot and tenderness to palpation, "severe per patient response," of the tarsal, metatarsal, and articulation metatarsals 1, 2, and 3. Dr. Fijalkowski ordered weight bearing radiographs, which documented an oblique fracture through the proximal portion of the fourth metatarsal, non-displaced. The x-ray also documented a deformity at the fourth metatarsal consistent with a subacute fracture with healing in the area, degenerative changes at the tarso metatarsal junction and plantar dorsal calcaneal spurs. (See Exhibit G, Dr. Fijalkowski's 10/19/21 office note, filed by the Employer below.)

Mr. Kittle testified by deposition on December 14, 2021. His testimony regarding the manner in which his injury occurred is as follows:

- "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." (p. 5, lines 2 – 3)
- "I was simply walking." (p. 12, line 17)
- "Q. So would it be fair to say you were walking at a brisk pace in a normal manner when you felt this pop or tear? A. I would say that, yes." (p. 13, lines 2 – 4)

(See Exhibit H, transcript of Claimant's deposition testimony, filed by the Claimant below.)

The Administrative Law Judge affirmed the Claims Administrator's Order on April 1, 2022. The Judge noted that the evidence indicates the claimant was "simply walking" when he felt pain on September 29, 2021, and that the claimant's description of the event indicates that his foot pain could have occurred any place, including while not working. Accordingly, the ALJ concluded that while the claimant established that he was injured in the course of his

employment; he did not establish by a preponderance of the evidence that he was injured as a result of his employment. The Board of Review affirmed the ALJ's decision on September 27, 2022, adopting the ALJ's Findings of Fact and Conclusions of Law.

III. ASSIGNMENT OF ERROR

The Board of Review's conclusion that Mr. Kittle did not sustain an injury in the course of and resulting from his employment, is not clearly wrong in view of the reliable, probative, and substantial evidence.

IV. SUMMARY OF ARGUMENT

The Board of Review and the ALJ correctly applied the law in concluding that a preponderance of the evidence demonstrates that Mr. Kittle did not sustain an injury resulting from his employment.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent does not request oral argument and does not believe that oral argument would assist this Court in the adjudication of this matter. The issues on appeal may be fully addressed by reviewing the facts and legal arguments presented in the briefs and the record on appeal, including the Appendix. There are no principles of law to be established or modified that would require oral presentation to the Court.

VI. ARGUMENT

A. Standard of Review

1. The decision of the Board of Review shall be reversed, vacated, or modified only if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review'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 procedure; 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; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code §23-5-12(a).

2. The resolution of any issue shall be based on a weighing of all evidence pertaining to the issue, and a finding that a preponderance of the evidence supports the chosen manner of resolution. W. Va. Code §23-4-1(g).

3. A claimant bears the burden of establishing his or her claim. *Bilchak v. State Worker's Compensation Commissioner*, 153 W. Va. 288, 168 S.E.2d 723 (1969).

4. Three elements must co-exist for a finding of compensability: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment. A disability incurred by an employee in the course of his employment, and not directly attributable to a definite, isolated, fortuitous occurrence, is not compensable under the State Compensation Act. *Barnett v. State Workmen's Compensation Commissioner*, 153 W.Va. 796, 172 S.E.2d 698 (1970).

5. "In the course of employment" and "resulting from employment" are not synonymous. The former relates to the time, place and circumstances of the injury and the latter, to its origin.

It is not enough to say the accident would not have happened, if the servant had not been engaged in the work at the time, or had not been in that place. It must appear that it resulted from something he was doing in the course of his work or from some peculiar danger to which the work exposed him. *Archibald v. Ott*, 77 W. Va. 448, 87 S.E. 791 (W. Va. 1915).

6. In determining whether an injury resulted from claimant's employment, a causal connection between the injury and employment must be shown to have existed. *Emmel v. State Compensation Director*, 150 W. Va. 277, 145 S.E.2d 29, 1965 W. Va. LEXIS 353 (W. Va. 1965)

B. Points of Argument

The Board of Review's Order is not clearly wrong in view of the reliable, probative, and substantial evidence, and therefore, the Order should be affirmed by this Court. It is well-settled that for an injury to be compensable, it must occur not only in the course of employment, but also resulting from employment. The Board and the ALJ correctly determined that a preponderance of the evidence demonstrates that Mr. Kittle did not sustain an injury *resulting from* his employment. Mr. Kittle has consistently reported that his injury occurred as he was simply walking and felt a pop or a tear in his foot. Although Mr. Kittle's injury occurred at work, and therefore *in the course of* his employment, the Board and the ALJ correctly concluded that the mechanism of injury of "simply walking" does not meet the second prong required for compensability, *resulting from* his employment. Mr. Kittle's injury did not result from something he was doing in the course of his work or from some peculiar danger to which the work exposed him, and he is not able to identify a definite, isolated, fortuitous occurrence that resulted in his injury. There is no causal connection between his injury and his employment as, the Board and ALJ correctly noted, it appears the injury would have occurred regardless of where Mr. Kittle had been "simply walking" at the time.

The Petitioner argues in his appeal brief that his claim is similar to the facts of *Cox v. Fairfield Inn*, No. 14-0871 (Memorandum Decision), in which the West Virginia Supreme Court of Appeals found that Ms. Cox, a hotel desk clerk, sustained a compensable injury when she twisted her right ankle and fell while walking around the corner of her desk to make sure that all of the hotel guests for that night had checked in. The facts of *Cox* are distinguishable from Mr. Kittle's situation, in that Ms. Cox's mechanism of injury was twisting her ankle and falling. Ms. Cox may not have twisted her ankle and fallen had she been walking somewhere other than around her desk at the time, and therefore, her injury *resulted from* her employment. Mr. Kittle was "simply walking" when he felt a tear or pull in his left foot. That tear or pull, which was ultimately diagnosed as a fracture of the fourth metatarsal, would have occurred regardless of where Mr. Kittle was "simply walking" at the time. The other Memorandum Decision cited by the Claimant in his brief, *Greenbrier Hotel Corp. v. Gutierrez*, No. 16-0507, involved a claim that was denied by the Claims Administrator based upon a file review physician's conclusion that the Claimant was injured prior to his arrival at work, and therefore, the decision did not substantively address the issue of whether the claimant's injury was *resulting from* his employment.

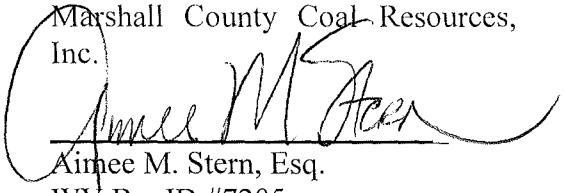
Three elements must co-exist for a finding of compensability: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment. *Barnett v. State Workmen's Compensation Commissioner*, 153 W.Va. 796, 172 S.E.2d 698 (1970). "In the course of employment" and "resulting from employment" are not synonymous. The former relates to the time, place and circumstances of the injury and the latter, to its origin. It is not enough to say the accident would not have happened, if the employee had not been engaged in the work at the time, or had not been in that place. It must appear that it resulted from something

he was doing in the course of his work or from some peculiar danger to which the work exposed him. *Archibald v. Ott*, 77 W. Va. 448, 87 S.E. 791 (W. Va. 1915). Mr. Kittle failed to meet his burden of proving that he sustained an injury *resulting from* his employment, and to find that he sustained a compensable injury while "simply walking" at work would ignore the third prong necessary for compensability.

VII. CONCLUSION

Based on the foregoing, the Board of Review's Order is not clearly wrong in view of the reliable, probative, and substantial evidence. The Respondent therefore respectfully requests that this Honorable Court affirm the Board of Review's September 27, 2022 Order.

Respectfully submitted,
Marshall County Coal Resources, Inc.



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the within and foregoing **Employer's Response to Claimant's Petition for Appeal,** upon all parties to this matter via Electronic Mail and/or File & ServeExpress to the following:

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This 22nd day of November, 2022.

Respectfully Submitted,

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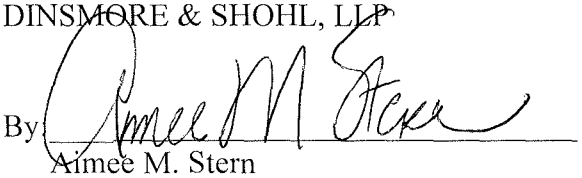
By 

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