

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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CASE NO. 22-ICA-262

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BLACKHAWK MINING, LLC,

Appellant,

vs.

APPEAL NO. 2058334

JCN. NO. 2021020512

DOI: 02/25/2021

HARRIS ARGABRIGHT,

Appellee.

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RESPONDENT'S BRIEF

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BRIEF FILED ON BEHALF OF THE CLAIMANT  
FROM AN APPEAL OF A FINAL DECISION OF THE WEST VIRGINIA  
WORKERS' COMPENSATION BOARD OF REVIEW

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**INTRODUCTORY NOTE**

The Respondent will be referred to as Claimant; the Workers' Compensation Board of Review will be referred to as BOR; the Office of Judges will be referred to as OOJ; the Administrative Law Judge will be referred to as ALJ; the third-party administrator will be referred to as Blackhawk Mining, LLC will be referred to as Employer or Petitioner

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**STATEMENT OF THE CASE**

The Claimant, an electrician for Blackhawk Mining, LLC ("Employer"), sustained injuries to his lower back and pelvis when he was tightening a strap on a speed reducer while working for Employer. The OOJ's Decision dated May 19, 2022, includes "Findings of Fact" which Claimant incorporates by reference into this response. In addition, the Claimant does highlight the following evidence of record below.

PA-C Prichard noted on April 26, 2021, that Claimant's symptoms were not getting better. **[Exhibit 1]** On April 29, 2021, Dr. Muscari requested Claimant be referred to Dr. Patel, noting an increase of pain, decrease in range of motion, and that the Claimant's symptoms were worsening. **[Exhibit 2]**

Dr. Muscari completed a Diagnosis Update form dated June 21, 2021 listing lumbar sprain with secondary diagnoses of Disc bulge L/2, L/3, L/5, S1. He noted "MIR showed multiple disc bulges. Authorization was denied for patient to see specialist." **[Petitioner's Exhibit I]**

In a report dated July 15, 2021, by Claimant's treating physician, Dr. Muscari stated that the Claimant had never been to his office for lumbar pain prior to the injury at hand. He stated the Claimant has been a coal miner all of his adult life, and until his injury was able to work and complete his job requirements. Since the injury, the Claimant has been unable to complete his job duties. Dr. Muscari stated that the injury is directly related to Claimant's employment, and that Claimant was not able to get specialty treatment because it was denied. He reported the Claimant had not been treated prior to this injury for lumbar symptoms and his recent MRI was abnormal. **[Petitioner's Exhibit K]**

In another correspondence from Dr. Muscari dated September 24, 2021, he stated that the Claimant was able to perform his job prior to the injury, yet after his injury is unable to complete his job requirements. He noted that Claimant was seen by Dr. Christiano at the Neuro/Spine Center and was referred to Pain Management for further evaluation, and participating in physical therapy. He stated again that the Claimant's

condition was related to the injury at hand, and that no prior treatment had been given for lumbar pain prior to the date of injury. **[Exhibit 3]**

By decision dated May 19, 2022, the OOJ reversed the CA's denials of May 17, 2021, and July 1, 2021, finding . **[Petitioner's Exhibit M]** The Employer protested only the addition of the disc bulges as compensable components.

By decision dated October 21, 2022, the BOR affirmed the OOJ decision of May 19, 2022, adding Disc Bulge L2, L3, L4, L5, and S1 as compensable under the claim, and denying Employer's motion to remand. **[Petitioner's Exhibit N]** The Employer appealed.

### **SUMMARY OF ARGUMENT**

The preponderance of the evidence provides that Claimant sustained disc bulges from L2 through S1 as a result of the compensable injury. The OOJ decision, and in turn the BOR decision, included no clear errors. Thus, there is no basis to reverse the ruling of the BOR decision pursuant to West Virginia Code § 23-5-12a(b).

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Respondent submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

### **ARGUMENT**

Under West Virginia Code § 23-5-12a(b), the Intermediate Court of Appeals "shall reverse, vacate, or modify the order or decision of the Workers' Compensation

Board of Review, 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; (2) In excess of the statutory authority or jurisdiction of the Board of Review; (3) Made upon unlawful procedures; (4) Affected by other error of law; (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."

Further, West Virginia Code § 23-4-1g requires that the resolution of the instant issue requires a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. If, after weighing all the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

In the case at hand, the ALJ was correct to adopt the position of the Claimant and his treating physician, properly finding that a preponderance of the evidence reveals the claim should be compensable for disc herniations at L2-S1.

Three elements must coexist in compensability cases: (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 WV 976, 172 S.E. 2d 698 (1970); Jordan v. State Workmen's Compensation Commissioner, 156 W.Va. 159, 191 S.E.2d 497 (1972).

As the ALJ noted in the OOJ decision, Dr. Mukkamala reviewed records from

Claimant's treating physician, Family Healthcare Associates, from January 11, 2013 to February 10, 2021, and found no complaints of lower back pain or symptoms. **[See Petitioner's Exhibit F]** Claimant's treating physician, Dr. Muscari, stated repeatedly that the Claimant was not treated for any lower back symptoms prior to the injury, and that the Claimant worked full time as a coal miner for his entire working life leading up to the injury, yet is unable to complete his job duties following the compensable injury because of his new symptoms.**[See, for example, Petitioner's Exhibit K, Respondent's Exhibit 3]**

Employer argues that the Claimant sustained a previous injury to his lower back in 2002, however, the Claimant reported to Dr. Mukkamala that it was mainly his ankle that was injured and he received 1% whole person impairment for his ankle at the time, and 0% for his back. **[Petitioner's Exhibit F]** He went back to work after four weeks.

While the Claimant's MRI did reveal degeneration, it is clear from the record that he was completely asymptomatic leading up to the injury at hand. Following the injury, however, the symptoms manifested and continued to grow worse, as documented by PA-C Pritchard and Dr. Muscari. Recent precedent states that a "claimant's disability will be presumed to have resulted from the compensable injury if: (1) before the injury, the claimant's preexisting disease or condition was symptomatic, and (2) following the injury, the symptoms of the disabling disease or condition appeared and continuously manifested themselves afterwards." Moore v. ICG Tygart Valley, LLC, No. 20-0028 (April 28, 2022) Syllabus 5. The prior ankle/back injury from 2002 that the Employer offers is not enough to rebut the Moore presumption in this case. In fact, it lends to

support the fact that Claimant was not suffering from any preexisting symptoms because he was awarded 0% whole person impairment for his lower back at that time due to the fact that, as Claimant explained, the injury occurred when a cable wrapped around his ankle and threw him mainly affected his ankle, and that he was able to go back to work and complete his job duties for many years after that event. It was not until the injury at hand that Claimant became unable to complete his work duties due to any lower back symptoms.

The Employer seems to argue that the Moore case requires the condition in question to be a "disability" and that Claimant's condition does not meet such standard. However, the Moore language plainly states: "the symptoms of the disabling disease **or condition** appeared..." Whether or not the disc bulges are considered a "disability" is not at issue here, and is not a requirement of Moore. The records provides that the Claimant was not suffering from such back symptoms prior to the compensable injury in this case, and that after the injury he could no longer work due to the symptoms that continued to manifest, meeting the Moore elements.

The Employer further argues that the Claimant did not suffer a "discreet new injury" under Gill v. City of Charleston, 236 W. Va. 737, 783 S.E.2d 857, 2016 W. Va. LEXIS 61 (W. Va. Feb. 10, 2016). This, too, is unfounded, as the bulk of the evidence is clear that the Claimant was able to complete his job duties for many years, yet upon the compensable injury, could no longer. There is nothing in the record that show the disc bulges existed prior to the injury at hand. Additionally, his treating physician was clear in his belief that the disc bulges were a direct result of the compensable injury that

occurred in the course of and resulting from Claimant's employment.

Because there was no clear error contained in the BOR decision, there is no basis under West Virginia Code § 23-5-12a(b) for its reversal. Accordingly, the October 21, 2022 decision of the BOR should be affirmed.

**PRAYER**

**WHEREFORE**, based upon the foregoing, the Claimant respectfully moves this Honorable Court to **AFFIRM** the BOR's decision of October 21, 2022.

Respectfully submitted,  
Harris Argabright  
By Counsel



Reginald D. Henry  
WV State Bar #: 4933



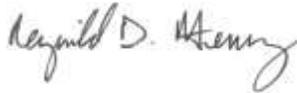
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**CERTIFICATE OF SERVICE**

I, Reginald D. Henry, counsel for the Claimant herein, do hereby certify that I served the foregoing Respondent's Brief and Appendix by forwarding a true copy thereof by File & Serve Xpress efileing, to the following:

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December 15, 2022



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