

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**ARCELORMITTAL USA HOLDINGS, LLC,
Employer Below, Petitioner**

v.) No. 23-ICA-520 (JCN: 2022011964)

**CHARLES MCKINNEY,
Claimant Below, Respondent**

FILED

April 22, 2024

ASHLEY N. DEEM, DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner ArcelorMittal USA Holdings, LLC, (“ArcelorMittal”) appeals the October 18, 2023, order of the Workers’ Compensation Board of Review (“Board”). Respondent Charles McKinney filed a response.¹ ArcelorMittal did not reply. The issue on appeal is whether the Board erred in reversing the claim administrator’s orders, which denied the addition of right hip stress fracture as a compensable condition and denied authorization of physical therapy and crutches as treatment for a right hip stress fracture.²

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2022). After considering the parties’ arguments, the record on appeal, and the applicable law, this Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the Board’s order is appropriate under Rule 21 of the Rules of Appellate Procedure.

On May 9, 2020, while employed by ArcelorMittal, Mr. McKinney sustained an injury to his right calf, when he felt a pop and then pain in his right lower leg while walking. On May 19, 2020, the claim administrator issued a corrected order holding the claim compensable for injury of the muscle and tendon of posterior muscle group at lower leg level, right leg, and closing the claim for temporary total disability benefits. Mr. McKinney protested this order to the Office of Judges (“OOJ”). On May 14, 2021, the OOJ issued a decision affirming the claim administrator’s order and, further, denying the addition of hypertension, and diabetes mellitus to the claim as compensable conditions. Mr. McKinney did not protest this decision.

¹ ArcelorMittal is represented by Jeffrey B. Brannon, Esq. Mr. McKinney is represented by Reginald D. Henry, Esq., and Lori J. Withrow, Esq.

² The Board’s order also affirmed the claim administrator’s denial of the addition of hip pain as a compensable condition. That portion of the order is not being appealed in the instant case.

Mr. McKinney underwent an x-ray on June 3, 2020, revealing possible femoroacetabular impingement in the right hip. On June 4, 2020, Mr. McKinney was seen by Jessica Sheets, FNP, for a follow-up of right leg/hip pain that he reported began in May 2020. On the same day, Mr. McKinney was seen by Robert Kropac, M.D., for right calf and right hip pain. Mr. McKinney underwent a right hip CT scan on June 5, 2020, revealing a mild subcutaneous edema in the right thigh.

On June 9, 2022, Mr. McKinney underwent an MRI of the right hip, revealing no acute or chronic changes. On June 15, 2022, Mr. McKinney was seen by Nathan E. Doctry, M.D. Mr. McKinney reported right leg pain and constant right hip pain. Dr. Doctry opined that the pain could be a stress fracture, a torn labrum, and/or an aggravation of a previously existing condition of femoral acetabular impingement. Mr. McKinney underwent a bone scan of the pelvis and both hips on August 24, 2022, revealing a slightly increased uptake in the right hip joint. After reviewing the bone scan, on September 6, 2022, Dr. Doctry opined that the results were consistent with a stress fracture of the right hip, and he recommended crutches and physical therapy as treatment.

Mr. McKinney was seen by Prasadarao Mukkamala, M.D., on December 28, 2022. Dr. Mukkamala opined that Mr. McKinney had reached maximum medical improvement (“MMI”) for his compensable injury and needed no further treatment. Dr. Mukkamala opined that Mr. McKinney had a strain of the right hip that had resolved. Dr. Mukkamala noted the possibility of a right hip stress fracture; however, he opined that he could neither confirm nor refute that diagnosis. The claim administrator issued an order dated January 31, 2023, which denied authorization for physical therapy and crutches. Mr. McKinney protested this order.

On February 20, 2023, Dr. Doctry submitted a diagnosis update form requesting that stress fracture of the right hip and right hip pain be added to the claim as compensable conditions. The claim administrator issued an order dated March 2, 2023, denying the addition of right hip stress fracture to the claim as a compensable condition. Mr. McKinney protested this order.

Mr. McKinney was seen by Michael Kominsky, D.C., on May 24, 2023. Dr. Kominsky opined that Mr. McKinney had reached MMI for the compensable injury. Dr. Kominsky further opined that right hip stress fracture should be added to the claim as a compensable injury, that Mr. McKinney should continue treatment with his orthopedic surgeon for two years, and that he would benefit from physical therapy.

On October 18, 2023, the Board reversed the claim administrator’s orders which denied the addition of right hip stress fracture as a compensable condition and denied authorization of physical therapy and crutches as treatment for a right hip stress fracture. The Board found that Mr. McKinney suffered a right hip stress fracture that is causally related to the compensable injury and that the requested treatment of physical therapy and

crutches were medically related and reasonably required treatment of right hip stress fracture. ArcelorMittal now appeals the Board's order.

Our standard of review is set forth in West Virginia Code § 23-5-12a(b) (2022), in part, as follows:

The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It 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.

Duff v. Kanawha Cnty. Comm'n, 247 W. Va. 550, 555, 882 S.E.2d 916, 921 (Ct. App. 2022).

On appeal, ArcelorMittal argues that there is no evidence establishing that Mr. McKinney suffered a right hip stress fracture. ArcelorMittal further argues that Mr. McKinney did not seek treatment for his alleged right hip stress fracture until two years after the compensable injury. Finally, ArcelorMittal argues that right hip stress fracture cannot be added to the claim as a compensable condition because the OJ did not find any additional conditions in the May 14, 2021, decision and Mr. McKinney did not protest that decision. We disagree.

Here, the Board determined that Mr. McKinney suffered a right hip stress fracture that is causally related to the compensable injury and added the diagnosis to the claim as a compensable condition. The Board noted that Mr. McKinney has consistently reported right hip pain in the two years since the compensable injury. Further, the Board noted that the August 24, 2022, bone scan revealed a slightly increased uptake in the right hip joint, which Dr. Doctry opined was consistent with a right hip stress fracture. Additionally, the Board found that the requested treatment of physical therapy and crutches were medically related and reasonably required treatment of right hip stress fracture, as that diagnosis is now compensable.

Upon review, we find that the Board was not clearly wrong in finding that Mr. McKinney suffered a right hip stress fracture that is causally related to the compensable injury. We find no merit in ArcelorMittal's argument that there is no evidence that Mr. McKinney suffered a hip fracture. We note that the August 24, 2022, bone scan revealed a slightly increased uptake in the right hip joint, which two providers have identified as consistent with a right hip stress fracture. We further note that there are no providers opining that Mr. McKinney does not have a right hip stress fracture; Dr. Mukkamala indicated that a right hip stress fracture was a possible diagnosis that he could not refute. Further, we find that the Board was not clearly wrong in finding that the requested treatment of physical therapy and crutches were medically related and reasonably required treatment of right hip stress fracture, based on the evidence.

Additionally, we find no merit in ArcelorMittal's argument that Mr. McKinney did not seek treatment for his alleged right hip stress fracture until two years after the compensable injury. We find that the Board was not clearly wrong in finding that there was sufficient evidence that Mr. McKinney has consistently reported right hip pain since the compensable injury to establish that the right hip stress fracture was causally related to the compensable injury.

Finally, we find no merit in ArcelorMittal's argument that right hip stress fracture cannot be added to the claim as a compensable condition because the OOJ did not find any additional conditions in the May 14, 2021, decision and Mr. McKinney did not protest that decision. We note that Mr. McKinney did not request the addition of right hip stress fracture at the time of the OOJ decision because it had not yet been diagnosed; thus, that diagnosis was not addressed in the OOJ decision. Accordingly, we find that Mr. McKinney is not barred from requesting the addition of a compensable diagnosis to his claim when that diagnosis had not been previously addressed in the claim. Further, we find that the fact that the OOJ did not find that Mr. McKinney had an additional diagnosis based on the evidence available to it at the time of its decision does not forever bar Mr. McKinney from requesting the addition of any other compensable diagnosis.

Accordingly, we affirm the Board's October 18, 2023, order.

Affirmed.

ISSUED: April 22, 2024

CONCURRED IN BY:

Chief Judge Thomas E. Scarr
Judge Charles O. Lorensen
Judge Daniel W. Greear