

**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

**DAVID L. ELMORE,  
Claimant Below, Petitioner**

v.) No. 23-ICA-534 (JCN: 2023007907)

**LBE HOLDINGS, LLC,  
Employer Below, Respondent**

**FILED  
April 22, 2024**

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

**MEMORANDUM DECISION**

Petitioner David L. Elmore appeals the October 30, 2023, order of the Workers' Compensation Board of Review ("Board"). Respondent LBE Holdings, LLC ("LBE") filed a response.<sup>1</sup> Mr. Elmore did not reply. The issue on appeal is whether the Board erred in affirming the claim administrator's order, which rejected the claim.

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 September 10, 2022, while employed by LBE, Mr. Elmore alleges that he sustained a low back injury when he was unloading a heavy box from a truck.<sup>2</sup> Mr. Elmore presented to the DMC Emergency Department on September 16, 2022, with complaints of low back pain. It was noted that Mr. Elmore had been seen the week prior with similar complaints. The assessment was acute on chronic low back pain, and back muscle spasm.

Mr. Elmore was seen by Mohamed Fahim, M.D., on September 20, 2022. Mr. Elmore reported that he had been injured at work while unloading a truck on September 10, 2022. The following were among the diagnoses made by Dr. Fahim: recurrent chronic low back pain; intervertebral disc disorders with radiculopathy, lumbar region, chronic; other spondylosis, lumbar region, chronic; sacroiliitis, chronic, recurrent; and pain in the right hip, chronic, recurrent.

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<sup>1</sup> Mr. Elmore is represented by J. Thomas Greene, Jr., Esq., and T. Colin Greene, Esq. LBE is represented by Jeffrey B. Brannon, Esq.

<sup>2</sup> Mr. Elmore has an extensive history of low back symptoms and treatment for degenerative low back conditions beginning in 2017.

On September 22, 2022, Mr. Elmore was seen by Christie Shoemaker, PA-C, for chronic lower back pain radiating into his legs. Mr. Elmore reported a work injury and that his pain after the injury was different and the pain had increased. PA Shoemaker's assessment was chronic lumbar intervertebral disc disorder with radiculopathy, chronic sacroiliitis, and chronic low back pain. On October 19, 2022, the claim administrator issued an order rejecting the claim due to a finding that Mr. Elmore did not sustain an injury in the course of and as a result of his employment. Mr. Elmore protested this order.

Mr. Elmore was deposed on February 6, 2023. Mr. Elmore testified that, on September 10, 2022, he was unloading a case from a truck when he felt a pop in his back, and he felt pain shoot down to both knees. Mr. Elmore stated that his symptoms prior to the injury were different than the current symptoms. Mr. Elmore further testified that he was able to continue to work despite his symptoms prior to the injury, but now he cannot work due to his low back stiffening up and shooting pain down to his knees.

On October 30, 2023, the Board affirmed the claim administrator's order which rejected the claim. The Board found that Mr. Elmore failed to establish that he suffered a discrete new injury. Mr. Elmore 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, Mr. Elmore argues that he suffered an isolated fortuitous event causing an occupational injury and since that disabling injury, he has developed an onset of new

symptoms. Mr. Elmore further argues that there is sufficient medical evidence to establish that his diagnosis of spondylosis was caused by his occupational injury.

The Supreme Court of Appeals of West Virginia has held that:

A noncompensable preexisting injury may not be added as a compensable component of a claim for workers' compensation medical benefits merely because it may have been aggravated by a compensable injury. To the extent that the aggravation of a noncompensable preexisting injury results in a [discrete] new injury, that new injury may be found compensable.

Syl. Pt. 3, *Gill v. City of Charleston*, 236 W. Va. 737, 783 S.E.2d 857 (2016).

The Supreme Court clarified its position in *Moore v. ICG Tygart Valley, LLC*, 247 W. Va. 292, 879 S.E. 2d 779 (2022), holding:

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 asymptomatic, and (2) following the injury, the symptoms of the disabling disease or condition appeared and continuously manifested themselves afterwards. There still must be sufficient medical evidence to show a causal relationship between the compensable injury and the disability, or the nature of the accident, combined with the other facts of the case, raises a natural inference of causation. This presumption is not conclusive; it may be rebutted by the employer.

*Moore* at 294, 879 S.E.2d at 781, syl. pt. 5.

Here, the Board determined that Mr. Elmore failed to establish that he suffered a discrete new injury. The Board noted that Mr. Elmore has a history of extensive back symptoms and treatment beginning in 2017. The Board found that, although Mr. Elmore indicated that his symptoms before and after the alleged injury were different, the presumption in *Moore* did not apply. The Board further noted that Mr. Elmore's diagnoses prior to and after the alleged injury were the same except for spondylosis, which the Board found to be a noncompensable degenerative diagnosis.

Upon review, we cannot conclude that the Board was clearly wrong in finding that Mr. Elmore failed to establish that he suffered a discrete new injury in the course of and resulting from his employment, based on the evidence of record. Further, we note that Dr. Fahim indicated that the diagnosis of spondylosis was chronic rather than acute. "[A] reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the [lower tribunal's] account of the evidence is plausible in light of the record viewed in its entirety." Syl. Pt. 5, *W. Va. State Police v.*

*Walker*, 246 W. Va. 77, 866 S.E.2d 142 (2021), citing Syl. Pt. 1, in part, *In Re Tiffany Marie S.*, 196 W. Va. 223, 470 S.E.2d 177 (1996). Further, our review is deferential to the Board. West Virginia Code § 23-5-12a(b) sets forth the same standard of review as was previously required of the Board when it reviewed decisions by the Office of Judges per West Virginia Code § 23-5-12 before the 2021 statutory amendments became effective. In considering West Virginia Code § 23-5-12, the Supreme Court of Appeals of West Virginia stated that the Board was required to accord deference to the decisions by the Office of Judges. *See Conley v. Workers' Comp. Div.*, 199 W. Va. 196, 203, 483 S.E.2d 542, 549 (1997). With this deferential standard of review in mind, we cannot conclude that the Board was clearly wrong in affirming the claim administrator's order, which rejected the claim.

Accordingly, we affirm the Board's October 30, 2023, order.

Affirmed.

**ISSUED:** April 22, 2024

**CONCURRED IN BY:**

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