

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**BILLY JOHNSON,
Claimant Below, Petitioner**

v.) Nos. 24-ICA-37, 24-ICA-50 (JCN: 2023009705)

**BLACKHAWK MINING,
Employer Below, Respondent**

**FILED
July 1, 2024**

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

MEMORANDUM DECISION

In these consolidated Workers' Compensation claims, Petitioner Billy Johnson appeals the December 27, 2023, and January 4, 2024, decisions of the Workers' Compensation Board of Review ("Board"). Respondent Blackhawk Mining ("Blackhawk") timely filed a response.¹ Mr. Johnson did not file a reply. The issues on appeal are whether the Board erred in affirming the claim administrator's orders, which held the claim compensable for only a sprain to the low back and granted no total temporary disability benefits ("TTD") and denied his request to reopen the claim for TTD benefits.

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 orders is appropriate under Rule 21 of the Rules of Appellate Procedure.

Prior to the compensable injury at issue in this case, Mr. Johnson was treated at Hill Chiropractic between August 14, 2015, and June 20, 2022. Mr. Johnson presented with symptoms at the lumbar, left lumbar, left sacroiliac, left posterior thigh, left side of neck, posterior cervical, right side of neck, left trapezius, upper thoracic and right posterior trapezius. Findings included mildly reduced ranges of motion of the lumbar and cervical spines. Mr. Johnson underwent chiropractic manipulative therapy. From April 5, 2021, to June 20, 2022, Mr. Johnson reported discomfort in the lumbar and cervical region, and his lumbar and cervical range of motion were moderately reduced. The diagnosis was segmental and somatic dysfunction of the cervical, thoracic, and lumbar regions.

Turning to the compensable injury in this case, Mr. Johnson completed an Employees' and Physicians' Report of Occupational Injury or Disease dated June 28, 2022.

¹ Mr. Johnson is represented by John H. Skaggs, Esq. Blackhawk is represented by Jeffrey B. Brannon, Esq.

The physician's portion of the form was completed by personnel at CAMC. Mr. Johnson presented at CAMC with injuries from a rock truck rollover. Mr. Johnson reported that he felt a pop and had tingling down his legs, as well as significant pain from his middle back down his spine. The examination revealed normal range of motion, and the assessment was back pain. Mr. Johnson was discharged on the same date.

On June 28, 2022, Mr. Johnson was seen at CAMC General Emergency Department. The reason for the visit was listed as motor vehicle crash. The diagnosis was mine and quarry accident and back pain. The medical provider did not restrict Mr. Johnson from returning to work at the time of this visit.

On June 29, 2022, Mr. Johnson was seen by Leah Smith, APRN-CNP. Mr. Johnson stated that he was driving a rock truck and was backing up to dump his load when the ground gave way and the truck fell over the berm about forty feet, and that he felt a pop in the middle of his back. He stated that he was having problems going to the bathroom. Ms. Smith's examination revealed spinal tenderness at the thoracic and lumbar spine with muscle spasticity noted. Sensory exam abnormalities were noted. Ms. Smith's assessment was lower back pain and encopresis.

On July 7, 2022, Mr. Johnson was seen by Connie D. Cook, PA-C. He complained of pain in the mid back and lower back radiating into the neck and lower extremities. PA-C Cook's assessment was lower back pain. On July 15, 2022, Mr. Johnson followed up with PA-C Cook and reported bowel irregularity and continued pain in his back. On August 29, 2022, Mr. Johnson again followed up with PA-C Cook. He reported pain in the mid back and lower back radiating into the neck and lower extremities, and continued bowel irregularity. The assessment was low back sprain.

On August 29, 2022, the claim administrator held the claim compensable for sprain to low back but granted no TTD benefits because Mr. Johnson had returned to work, and, thus, he was not entitled to wage loss benefits. Mr. Johnson protested this order to the Board.

On October 12, 2022, Jon Dahlke, the night shift foreman at Blackhawk gave a statement regarding the June 28, 2022, injury. Mr. Dahlke stated that on the day of the accident Mr. Johnson backed a truck through a berm and over the hill. Mr. Dahlke stated that he was the first one to get to the rock truck after the incident, and that Mr. Johnson complained of a sore back. Mr. Dahlke stated that the following day Mr. Johnson was released to return to work, and that he was brought into a meeting where he was suspended pending an investigation. Mr. Dahlke stated that Mr. Johnson did not make any complaints about injuries during this meeting.

Mr. Johnson returned to PA-C Cook on October 24, 2022. He reported continued mid back and lower back pain radiating into the neck and lower extremities, as well as

bilateral hand numbness. The assessment was lower back sprain. PA-C Cook recommended that Mr. Johnson remain off work for four weeks,

On November 4, 2022, Mr. Johnson followed up with PA-C Cook. Mr. Johnson reported that he had not returned to work following his injury. PA-C Cook opined that Mr. Johnson was not at MMI, but that he was ready for a PPD rating. PA-C Cook stated that the estimated period of disability was from June 28, 2022, to the present date.

On December 20, 2022, Mr. Johnson completed an interrogatory. Mr. Johnson reported that the C1 and C3 levels of his neck and the L5 and S1 levels of his back were injured as a result of the compensable injury, and that he had been temporarily and totally disabled from June 28, 2022, to the date that the interrogatory was completed. Mr. Johnson stated that he had not been involved in any non-work-related accidents.

On February 15, 2023, Mr. Johnson testified at a deposition that he injured the levels of C-1 and C-3 in his neck and L5 and S1 in his back. Mr. Johnson testified that he had been treated by PA-C Cook, who referred him to physical therapy, and that he had been going to physical therapy three days a week. Mr. Johnson testified that he was experiencing sharp pain down the middle of his neck to his back. Mr. Johnson testified that he was receiving shots in his back about once a month, and that the therapy was not helping his pain. Further, Mr. Johnson stated that he had not returned to work following the injury. Mr. Johnson testified that he saw a chiropractor from 2010 until June 20, 2022, prior to the compensable injury. Mr. Johnson also stated that he was having bowel problems following his injury.

On March 13, 2023, PA-C Cook completed the Attending Physician's Benefits Form. PA-C Cook opined that Mr. Johnson was not at maximum medical improvement ("MMI"), but that he was ready for a permanent partial disability ("PPD") rating. PA-C Cook stated that the estimated period of disability was from June 28, 2022, to the present.

On March 31, 2023, the claim administrator issued an order denying Mr. Johnson's request for a reopening for TTD benefits, on the basis that there was no medical evidence that he sustained an aggravation or progression of his compensable injury. Mr. Johnson protested this order. By separate order dated June 6, 2023, the claim administrator denied Mr. Johnson's authorization and reimbursement for treatment rendered by Family Healthcare on May 17, 2023, on the basis that the treatment requested was neither medically necessary nor reasonably required to treat the compensable condition in the claim. Mr. Johnson protested this order.

On July 31, 2023, Mr. Johnson underwent an independent medical examination ("IME") performed by Prasadarao Mukkamala, M.D. Mr. Johnson presented with neck pain and pain in the lower back and stated that he had leakage of the bowel and the bladder. Dr. Mukkamala noted that Mr. Johnson had previously experienced back pain, and that he

had received chiropractic treatment on and off. Dr. Mukkamala's diagnosis was lumbar sprain/strain. Dr. Mukkamala opined that Mr. Johnson had reached maximum medical improvement ("MMI") with regard to the compensable injury. Based upon the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) ("*Guides*") and West Virginia Code of State Rules § 85-20 ("Rule 20"), Dr. Mukkamala opined that Mr. Johnson had an 8% whole person impairment ("WPI") for the lumbar spine. Dr. Mukkamala apportioned 4% to preexisting noncompensable degenerative spondyloarthropathy and 4% to the compensable injury.

On August 31, 2023, Mr. Johnson gave an additional deposition. Mr. Johnson testified that his lumbar and cervical symptoms remained, but that he was ready, willing, and able to work when he appeared at the employer's worksite on June 29, 2022.

On December 27, 2023, the Board issued an order affirming the claim administrator's order dated August 29, 2022, which approved the claim for lumbar sprain and denied TTD benefits. The Board found that Mr. Johnson testified on August 31, 2023, that he returned to work on June 29, 2022, and was ready, willing, and able to work his shift that day, but that he was sent home and terminated two days later. The Board found that the evidence established that Mr. Johnson could return to work but did not due to causes other than his compensable lumbar sprain injury. The Board also affirmed the order insofar as it held the claim compensable only for sprain to low back. The Board noted that the only medical opinion on record regarding compensable conditions was Dr. Mukkamala's unrefuted opinion that a lumbar sprain/strain resulted from the compensable injury. The Board was unpersuaded by Mr. Johnson's argument that his neck and other body parts should have been ruled compensable.

On January 4, 2024, the Board issued an order affirming the claim administrator's orders denying Mr. Johnson's request to reopen his claim for TTD benefits and denying authorization for payment of treatment rendered by Family Healthcare. The Board held that Mr. Johnson had not established an aggravation or progression of the compensable injury which would entitle him to additional TTD benefits. The Board held that because Mr. Johnson had been terminated and had no wages to replace, he was not entitled to further TTD benefits. The Board cited *Buzzard v. W. Va. Off. of Ins. Comm'r*, No. 15-0771, 2016 WL 3574838 (W. Va. June 24, 2016) (memorandum decision). Further, the Board noted that the record did not contain a report from an office visit dated May 17, 2023. Thus, the Board held that the evidence failed to establish that the May 17, 2023, Family Health office visit was medically related and reasonably required for the compensable injury. Mr. Johnson now appeals the Board's orders.

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.

Mr. Johnson appeals only the portion of the Board's orders that denied his request for TTD benefits, his request to reopen TTD benefits, and that held compensability was limited to the lumbar sprain. Mr. Johnson argues that the Board erred in finding that he had not met his burden of proof to show that cervical sprain should be added as a compensable condition. Further, Mr. Johnson argues that the Board failed to weigh the evidence as required by statute and that the Board did not assess the relevance, credibility, materiality, and reliability of the evidence. We disagree.

As the Supreme Court of Appeals of West Virginia has set forth, "[t]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996). With this deferential standard in mind, we cannot conclude that the Board was clearly wrong in affirming the claim administrator's order denying additional TTD benefits.

In the Board's January 4, 2024, order, the Board found that Mr. Johnson failed to establish that there was an aggravation or progression of the injury which would entitle him to a reopening for additional TTD benefits. Further, the Board cited to *Buzzard v. W. Va. Off. of Ins. Comm'r*, No. 15-0771, 2016 WL 3574838 (W. Va. June 24, 2016) (memorandum decision), and stated that TTD benefits were wage replacement benefits, and because Mr. Johnson had no wages to replace due to his termination, he was not entitled to further TTD benefits. This Court notes that West Virginia Code § 23-4-1c(a)(2)(B) (2009) does not provide an automatic bar to an award of benefits where an employee is laid off or terminated from employment. See *Bevins v. W. Va. Off. of Ins. Comm'r*, 227 W. Va. 315, 708 S.E.2d 509 (2010). Based on the foregoing, the Board's reliance on Mr. Johnson's termination as the basis for denying further TTD benefits was in error. However, we affirm

the Board's decision on other grounds apparent in the record, as stated below. Syl. Pt. 2, *Adkins v. Gatson*, 218 W. Va. 332, 333, 624 S.E.2d 769, 770 (2005) (citation omitted) ("This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.")

In both orders, the Board noted that Mr. Johnson's claim was held compensable only for a lumbar sprain, and further noted that the medical evidence in the record did not support the compensability of cervical strain as requested by Mr. Johnson. Indeed, Dr. Mukkamala and PA-C Cook diagnosed Mr. Johnson with a lumbar sprain, and Mr. Johnson submitted no medical evidence establishing that a neck injury was caused by the June 28, 2022, workplace accident. Therefore, the Board did not commit error when it affirmed the claim administrator's order holding the claim compensable for a lumbar sprain.

To qualify for TTD benefits, a claimant must be unable to return to employment because of a compensable injury. If a claimant is released to return to work, returns to work, or is placed at maximum medical improvement, he or she is no longer entitled to TTD benefits. *See* W. Va. Code § 23-4-7a (2005). Further, in order to reopen a claim for TTD benefits, a claimant must show an aggravation or progression of a compensable condition or facts not previously considered, which would entitle the claimant to greater benefits than previously received. *See* W. Va. Code § 23-5-2 (2005) and 23-5-3a. As defined in Syllabus Point 3 of *Harper v. State Workmen's Compensation Commissioner*, 160 W. Va. 364, 234 S.E.2d 779 (1977), "cause" for further adjustment of an award has been interpreted as a showing of a prima facie cause, which means nothing more than any evidence which would tend to justify, but not compel, the inference that there has been a progression or aggravation of the former injury.

Here, it is undisputed that Mr. Johnson testified on August 23, 2023, that he was ready, willing, and able to return to work on June 29, 2022, which was one day after the compensable injury. Moreover, the treatment record from CAMC dated June 28, 2022, does not restrict Mr. Johnson from working. Mr. Johnson also failed to submit a claim reopening form which could establish that he sustained an aggravation or progression of the compensable lumbar sprain, and Dr. Mukkamala found him to be at MMI. Moreover, PA-C Cook's attending physician reports are not good evidence of an aggravation or progression, because they contradictorily state that Mr. Johnson was not at MMI, but that he was ready for a PPD evaluation. Mr. Johnson was not restricted from work. Thus, he did not qualify for TTD benefits and the Board correctly affirmed the claim administrator's orders denying TTD benefits.

Based on the foregoing, the Board committed no errors which affect the outcome of this case. Therefore, we affirm the Board's December 27, 2023, and January 4, 2024, orders affirming the claim administrator's denial of Mr. Johnson's request for TTD benefits,

denial of the request to reopen TTD benefits, and holding the claim compensable for a lumbar sprain.

Affirmed.

ISSUED: July 1, 2024

CONCURRED IN BY:

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