

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**AUSTIN CECIL,
Claimant Below, Petitioner**

v.) **No. 24-ICA-53** (JCN: 2023006775)

**PEPSI-COLA METROPOLITAN BOTTLING CO.,
Employer Below, Respondent**

**FILED
July 30, 2024**

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

MEMORANDUM DECISION

Petitioner Austin Cecil appeals the January 10, 2024, order of the Workers' Compensation Board of Review ("Board"). Respondent Pepsi-Cola Metropolitan Bottling Co. ("Pepsi") filed a response.¹ Mr. Cecil 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 18, 2022, Mr. Cecil alleges that he was injured at work, while employed by Pepsi, when he picked up Pepsi products to load into a cart and felt pain in his back. Mr. Cecil was seen by Lynn Patton, FNP-BC, at Bland County Medical Clinic on September 22, 2022. Mr. Cecil reported low back pain radiating down his right leg with numbness and tingling that he had been experiencing for three weeks. Mr. Cecil stated that he had been taking Flexeril to help with the discomfort and that he wanted an injection. NP Patton assessed radiculopathy in the lumbar region, panniculitis involving the lumbar region, acute right sided low back pain with right sided sciatica, and muscle spasm. NP Patton prescribed Prednisone, Ibuprofen, and Methocarbamol; and administered a trigger point injection.

Mr. Cecil reported the alleged injury to his supervisor, Adam Twitty, on September 22, 2022. On September 23, 2022, Mr. Cecil reported the alleged injury to Pepsi's workers'

¹ Mr. Cecil is represented by Gregory S. Prudich, Esq. Pepsi is represented by Jeffrey B. Brannon, Esq.

compensation administrator by phone. An Employer's Report of Occupational Injury or Disease ("WC-1") form was completed on the same day, and the date of injury was identified as September 18, 2022. Mr. Cecil filed an Employees' and Physicians' Report of Occupational Injury or Disease form dated October 5, 2022. Mr. Cecil indicated that his back injury occurred on September 25, 2022, and he described the injury as occurring when he was picking up Pepsi product and loading it onto cart. NP Patton completed the physician's portion of the form dated October 4, 2022. NP Patton identified the date of initial treatment as September 22, 2022, and described the injury as a "possible herniated disc in lumbar spine causing right leg weakness." She indicated that the condition was the direct result of an occupational injury, which did not aggravate a prior injury/disease.

On October 2, 2022, Mr. Cecil told Mr. Twitty he could not work the rest of that week because he was in too much pain. On October 5, 2022, Mr. Cecil followed up with NP Patton and reported that he experienced much more severe pain in the mornings. Mr. Cecil stated that he lifted and used his back every day at work and his job consisted of constant lifting, pulling, and squatting on a daily basis. NP Patton took Mr. Cecil off work indefinitely and started him on a treatment plan.

The claim administrator issued an order dated October 13, 2022, denying the claim on the basis that Mr. Cecil did not suffer a compensable work injury. Mr. Cecil protested this order. Mr. Cecil underwent a lumbar MRI on October 16, 2022, revealing a right posterolateral disc herniation at L5-S1 with posterior displacement, compression of the right nerve root exiting at S1-S2, and diffuse disc bulging at L4-L5 with minimal prominence to the left of midline without significant nerve root compression. Mr. Cecil underwent a right L5-S1 microsurgical discectomy performed by James Leipzig, M.D., on December 7, 2022, for the diagnosis of right L5-1 disc herniation and right S1 radiculopathy.

On February 8, 2023, Mr. Cecil was deposed, and he testified that he had worked for Pepsi for ten years as a sales representative. Mr. Cecil further testified that his job required him to be able to lift, bend, stoop, and carry cases of soda. Mr. Cecil testified that on September 18, 2022, he was at the Athens Road Grant's, picked up a packet of six-packs and when he turned to put it on a cart, he felt pain in his back. Mr. Cecil stated that he continued to work, but his symptoms worsened. Mr. Cecil testified that he did report the injury to "workers' comp" and to his supervisor, Mr. Twitty.

Mr. Cecil further testified that he continued to work, but that his symptoms continued to worsen and ultimately, he was taken off work by his treating provider. During his testimony, Mr. Cecil testified that prior to the September 18, 2022, injury he had no history of chronic back or leg pain, had not suffered a prior back injury, had no history of any arthritic conditions, and had not seen any physician for back pain. He further testified that prior to the injury he had no problem performing the duties of his job, including the lifting, bending, and stooping required of his job; or with hobbies or routine activities of daily living.

On June 26, 2023, NP Patton was deposed, and testified that she first saw Mr. Cecil at Bland County Medical Clinic on September 22, 2022. NP Patton stated that on September 22, 2022, Mr. Cecil complained of low back pain that had been going on for three weeks and he was taking Flexeril. NP Patton testified that she did not prescribe Flexeril to Mr. Cecil. NP Patton testified that Mr. Cecil had not identified a specific, isolated, fortuitous event that caused his back pain. NP Patton testified she thought it was a possibility during Mr. Cecil's initial visit that he might have a disk injury that was responsible for his symptoms. NP Patton stated that Mr. Cecil was unable to work as of October 2, 2022. NP Patton testified that she signed the WC-1 form on October 4, 2022, when she was made aware of the occupational nature of Mr. Cecil's injury. NP Patton testified that Mr. Cecil reported lifting cases of Pepsi to build a display. When asked if she had any reason to not believe that Mr. Cecil was injured on September 18, 2022, as he reported, NP Patton testified that she had no reason to not believe that. NP Patton stated that lifting and twisting while lifting was the kind of mechanism that could result in a disk herniation in the spine.

Mr. Cecil signed an affidavit dated August 14, 2023, stating that he sustained a workplace injury on September 8, 2022. As a result of that injury, he was unable to work from October 20, 2022, to March 6, 2023. He was off work due to the injury that resulted in back surgery. He returned to work upon being released to return to work on March 7, 2023. During his time off work, he was unable to perform the essential duties of his job due to his injury related functional limitations.

On January 10, 2023, the Board affirmed the claim administrator's order rejecting the claim. The Board found that Mr. Cecil failed to establish that he suffered an injury in the course of and resulting from his employment on September 18, 2022. Mr. Cecil 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.

Mr. Cecil argues that the Board erred in finding that his credibility was undermined by mistakes in the documenting of the claim. Mr. Cecil further argues that the Board failed to consider the entire record, which reveals that he reported his injury to his supervisor the next day and to the claim administrator within a week. Finally, Mr. Cecil argues that the Board failed to consider that, prior to the alleged injury, there was no medical evidence of preexisting back injuries or symptoms.

Here, the Board found that Mr. Cecil made inconsistent and contradictory statements about when and how the injury occurred, which when considered with his late reporting of the alleged injury diluted the credibility of the claim. Further, the Board found that the claim is undermined by the fact that NP Patton testified that Mr. Cecil did not identify a specific injury occurring at work on any specific date, and the fact that she signed the WC-1 form on October 4, 2022, indicating that he had an occupational injury on September 25, 2022, even though she had treated Mr. Cecil previously on September 22, 2022, for symptoms that began on September 1, 2022. Thus, the Board found that Mr. Cecil failed to establish by competent and convincing evidence that he sustained an injury in the course of and resulting from his employment on September 18, 2022.

Upon review, we conclude that the Board was not clearly wrong in finding that Mr. Cecil's contradictory statements regarding the date of his injury and his medical records do not support that he suffered a compensable injury on September 18, 2022. "[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, 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 of review in mind, we cannot conclude that the Board was clearly wrong in finding that Mr. Cecil has failed to establish that he sustained an injury in the course of and resulting from his employment.

Accordingly, we affirm the Board's January 10, 2024, order.

Affirmed.

ISSUED: July 30, 2024

CONCURRED IN BY:

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