THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

Robert Hood, Claimant,

Petitioner

v.

JCN No. 2020023734
SC No. 21-0754

Lincare Holdings, Inc., Employer,

Respondent.

BRIEF ON BEHALF OF RESPONDENT LINCARE HOLDINGS, INC.

Lisa Warner Hunter *WV Bar ID # 7523*
WILLIAM J. FERREN & ASSOCIATES
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Lincare Holdings, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. NATURE OF THE PROCEEDING

This proceeding arises out of the claimant's appeal from the Board of Review's order dated August 23, 2021. The Board of Review affirmed the Office of Judges' Decision dated February 4, 2021, which affirmed the claim administrator's order dated May 21, 2020 denying the claim. The claimant completed a WC-1 form on May 1, 2020 alleging an injury occurring on that date. The claimant alleged injury to his "right knee" due to "walking down steps and felt and heard a loud pop." The claimant treated at the Wheeling Hospital ER on May 1, 2020 and indicated that he was ambulating down steps when he heard and felt a pop. The claim administrator issued an order dated May 21, 2020 denying the claim. The claimant protested this order. The claimant testified by deposition on August 5, 2020. He indicated that he was holding the handrail while walking down a 3-stair set of steps. He transferred his weight and stepped down on the second step with his right foot, which is when he felt the pain and heard the pop. He texted his supervisor immediately afterward and said he thought he blew out his knee. The Office of Judges issued a Decision dated February 4, 2021, which affirmed the May 21, 2020 order denying the claim for an alleged knee injury. The claimant filed an appeal from the decision to the Board of Review. The Board of Review issued an order dated August 23, 2021 affirming the Office of Judges' Decision. The claimant filed an appeal from the August 23, 2021 decision to this Honorable Court.

II. STATEMENT OF THE FACTS

The claimant, Robert Hood, completed a West Virginia Workers' Compensation Employees' and Physicians' Report of Occupational Injury or Disease (WC-1) form on May 1, 2020 alleging an injury occurring on that date. At the time of the alleged injury, the claimant was employed by Lincare Holdings, Inc, as a driver delivery person. The claimant alleged injury to his "right knee" due to "walking down steps and felt and heard a loud pop." He indicated that the

injury did not occur on the employer's premises. He indicated that he was working on 12th St. in Moundsville.

Section II of the WC-1 form was completed by medical personnel at Wheeling Hospital on May 5, 2020. The medical personnel indicated that the claimant's date of initial treatment was the date of injury. The occupational injury was listed as R knee with diagnosis code S8.391XA-X50.0XXH. The description of injury was "walking down steps + R knee popped."

The employer, Kim Harmon, provided notice of the alleged May 1, 2020 injury to Travelers on May 6, 2020. The alleged injury was reported to the employer on May 1, 2020. The description of the accident was that the claimant was walking down the stairs when he felt and heard his right knee pop. The claimant alleges a knee sprain. The claimant was hired on September 21, 2010 and works as a service rep. The date the claimant would return to work was unknown. The additional comments indicate that the claimant was having an issue with the same right knee earlier in the week of the injury. The claimant was having an MRI of the knee.

The claimant treated at the Wheeling Hospital ER on May 1, 2020. The chief complaint summary indicates that the claimant is a "52 y/o male [who] presented to Ed. Pt presents for evaluation of right knee pain. States he was ambulating down steps. States hearing and feeling a pop." The claimant complained of burning and 6/10 pain to the inside of the knee. The chief complaint was again indicated as the claimant felt a pop to his right knee when walking down the steps at work. The claimant had immediate onset of pain and started swelling shortly after. The list of the claimant's medication included about 12 medications including Norco (opioid pain medication) and Methocarbomol (muscle relaxer). The claimant was given a Toradol injection and a Depo Medrol injection. The impression was right knee sprain. The claimant was recommended to follow up with an orthopedist due to concern for an MCL injury. The record

states that the claimant has crutches at home. He was advised to avoid weight-bearing for a few days and try to reintroduce.

X-rays of the right knee were taken at the ER on May 1, 2020. The impression was degenerative changes with a possible small effusion.

The claimant returned to Wheeling Hospital on May 5, 2020. He was seen at the ortho clinic by Dr. Jeffrey Abbott, DO. The claimant again reported the injury as occurring while he was walking down the steps at work on May 1, 2020 when he felt a pop in his right knee and had immediate pain. The claimant's height was recorded as 6' and his weight was 433 pounds. The claimant indicated that he was given Norco for the pain and that he has only taken two of the Norco. The more activity he does, the more pain he has. He has stiffness in the morning and with sitting for too long. At times, the knee feels like it's going to give out on him. Certain movements give a sharp, throbbing pain. The assessment was medial meniscus tear of the right knee and an MRI was ordered. He also issued a letter of medical necessity requesting a cold compression therapy device for the claimant's right knee.

X-rays of the right knee were done again on May 5, 2020. The impression was knee joint effusion with a history of trauma and no visible fracture. Internal derangement could not be excluded. The claimant should remain off work until follow-up after the MRI.

Ross Tennant, FNP, examined the claimant at Wheeling Hospital on May 11, 2020. The claimant reported he was walking down the steps from a client's patio when he experienced a popping sensation to his right knee. He was seen at the emergency department at Wheeling Hospital and x-rays were done that show degenerative changes with possible small effusion. The claimant was referred to orthopedics for follow-up. He was seen by Dr. Abbott last week who ordered an MRI of the right knee. The claimant reported some improvement to the pain and discomfort in his right knee over the past weeks. He is able to bear full weight on his right lower

extremity, but has difficulty with steps. Any twisting motion exacerbates his symptoms. He denies any paresthesias. He also denied any color or temperature change to the right lower extremity or any instability when ambulating. He denied prior injury to his right knee. Upon examination, the claimant had a small amount of edema to the right knee. He was tender along the medial joint line. He had adequate extension of the right knee, but the flexion exacerbated the current symptoms. The impression was right knee sprain and the claimant was advised to follow up with orthopedics regarding the MRI. He is unable to return to work at this time.

The claimant's deposition was taken on August 5, 2020. He testified regarding the May 1, 2020 right knee incident. The claimant's birthdate is March 29, 1968. He is 6'2" tall and weighs about 440 pounds. He has worked as a delivery driver for the employer, Lincare, for about 10 years. The employer's building is in downtown Wheeling. He indicated that he reports for work in his personal vehicle each morning and obtains his assignment for the day. His regular hours are 8:30 to 5:00. He is on call every sixth week or possibly every fifth week since, at the time of injury, they only had five drivers instead of the usual number of six. He indicated that there is a Monday morning meeting each week, which his supervisor, Kim, attends unless she is called away. He indicated that there was a room in the warehouse with a counter and chairs where they meet each morning.

The claimant indicated that the injury occurred during his third stop of the day at Mr. Mitchell's house who is a regular customer. The client was standing on the porch when he arrived, and he first asked the client if he needed anything else in addition to the replacement bottles because this client sometimes needs other supplies. The client indicated that he did not need any other supplies. The claimant grabbed the client's 5 empty oxygen bottles and took them to the van. He took the replacement 5 bottles, which he testified in total probably weighed 22 pounds. He set them inside the client's door and told the claimant to have a nice day. He went to step down

and felt a burning pain and heard the knee pop. He denied any prior issues with his knee including a denial of any treatment. There were 3 wooden steps to step up onto the client's porch. He was empty-handed when he went to walk down the steps.

During cross-examination, the claimant was asked if he recalled providing a statement to the investigator for Travelers after he reported the injury. He indicated that he remembered giving a statement. The claimant was advised that he told the investigator that he went into the client's residence and used the restroom before leaving. He did not include that statement during his testimony on direct. He indicated that he did use the restroom. He stated that he was exiting the house before going down the stairs when the injury occurred. The claimant stated that he exited the house with no issue. He was holding the handrail of the three wooden steps with his right hand. He stepped down on the first step with his left leg with no issues. He transferred his weight and stepped down on the second step with his right foot, which is when he felt the pain and heard the pop. He again agreed that he was not carrying anything and the steps were in good condition.

The claimant testified that he sent a message on his phone to his supervisor, Kim Harmon, when he got back to the van. He testified that he saved the message and it states "I think I just blew out my knee. I need to get it checked." He stated that the message was sent at 2:21 p.m. on May 1, 2020. He made one more delivery right around the corner from Mr. Mitchell's house. He delivered 12 bottles of oxygen to the front porch. Each bottle weighed 17 pounds. He left the bottles there and the client indicated that he would have his son carry them up the steps and into his house. The claimant indicated that he could not carry the bottles due to his knee.

The claimant was seen at Wheeling Hospital after returning the van to the shop and taking his own personal vehicle. The claimant was supposed to be on call for the weekend, but he indicated that Kim arranged for others to cover his call that weekend. He indicated that he spent 3 days in his recliner with ice on his knee over the weekend. He saw Dr. Jeffrey Abbott at

Wheeling Hospital. Dr. Abbott ordered an MRI of the knee. The claimant indicated that the claim was denied so he did not have the MRI. He had not returned to work as of the deposition date. He testified that walking to and from the client's house is part of his job.

The claimant's primary care physician is Dr. Bradley Schmidt and has been for about 2 years. His prior PCP was Douglas Tribiano in Rayland, Ohio. The claimant indicated that Dr. Tribiano got in trouble, so he found a new PCP. The claimant's regular medications are Effexor and Lisinopril. He also takes a muscle relaxer, Robaxin, which was prescribed by Dr. Schmidt related to back pain from his 2001 low back surgery. This is prescribed to take as needed. He indicated that Dr. El-Kadi performed his low back surgery.

The Office of Judges issued a Decision dated February 4, 2021, which affirmed the May 21, 2020 order denying the claim for an alleged knee injury. Administrative Law Judge Douglas Atkins thoroughly analyzed the medical records and facts of this claim including the claimant's deposition testimony. Judge Atkins discussed the Supreme Court's Memorandum Decision in the King case issued in 2019. In that case, the main basis for upholding the denial of the claim was that the claimant's injury did not result from his employment. The Court discussed the fact that the claimant was walking and did not slip, trip or fall and was not carrying materials related to his employment. In the subject case, the claimant merely took a step down a stair and his knee became symptomatic. Accordingly, Judge Atkins determined that the claimant was not injured as a result of his employment and the order denying the claim was affirmed. The claimant filed an appeal from the decision to the Board of Review.

The Board of Review issued an order dated August 23, 2021 affirming the Office of Judges' Decision. The claimant has filed an appeal from the August 23, 2021 decision to this Honorable Court. This is the employer's response to the claimant's appeal.

III. ISSUE

WHETHER THE BOARD OF REVIEW WAS PLAINLY WRONG TO AFFIRM THE ADMINISTRATIVE LAW JUDGE'S DECISION DATED FEBRUARY 4, 2021 WHICH AFFIRMED THE CLAIM ADMINISTRATOR'S ORDER DATED MAY 21, 2020 DENYING THE CLAIM WHERE THE CLAIMANT WAS EXITING A CLIENT'S HOUSE, WAS HOLDING THE HANDRAIL TO WALK DOWN 3 STEPS, WAS NOT CARRYING ANYTHING, AND FELT A BURNING PAIN IN HIS RIGHT KNEE AFTER TAKING HIS FIRST STEP ON THE LEFT KNEE THEN TRANSFERRING HIS WEIGHT TO HIS RIGHT KNEE?

IV. ARGUMENT

The Board of Review was not plainly wrong to affirm the Administrative Law Judge's decision dated February 4, 2021 affirming the claim administrator's order dated May 21, 2020 denying the claim because the objective evidence establishes that the claimant's knee condition did not result from his employment. Accordingly, the lower rulings denying the claim should be affirmed.

In accordance with the foregoing statutory directives and case law, and in recognition of the fact that it is now claims administrators, and not the Workers' Compensation Commission, who make initial rulings with respect to workers' compensation claims, this Court now expressly holds that, when reviewing a decision of the West Virginia Workers' Compensation Board of Review ("the Board"), this Court will give deference to the Board's findings of fact and will review de novo its legal conclusions. The decision of the Board may be reversed or modified only if it (1) is in clear violation of a constitutional or statutory provision; (2) is clearly the result of erroneous conclusions of law; or (3) is based upon material findings of fact that are clearly wrong. Moran v. Rosciti Constr. Co., LLC, No. 17-0993, 2018 WL 2769077 (W. Va. June 4, 2018).

The Board of Review shall reverse a final order only if the substantial rights of the petitioner have been prejudiced because the Administrative Law Judge's findings are (1) in

violation of statutory provisions; (2) in excess of the statutory authority or jurisdiction of the Administrative Law Judge; (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. W. Va. Code § 23-5-12(b)(2005).

When the Office of Judges performs its duty as trier of fact and reviews the evidence of record in this claim, it is required to do so under the preponderance of the evidence standard set forth by statute. West Virginia Code § 23-4-1g, as amended by S. B. 2013 (2003) states:

> (a) For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.
>
> (b) Except as provided in subsection (a) of this section, a claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter or in determining the constitutionality of this chapter.

W. Va. Code § 23-4-1g (2003).

"[T]he Commissioner shall disburse the workers' compensation fund to the employees. . . [who] have received personal injuries in the course of and resulting from their covered employment. . . ." W. Va. Code § 23-4-1 (1999).

"[I]t is unquestioned that when one incurs a disability personal to his own condition of health, though the disability may occur in the course of employment, it is not compensable." Jordan v. State Workmen's Compensation Comm'r, 156 W. Va. 159, 164, 191 S.E.2d 497, 500 (1972) (citing Martin v. State Compensation Comm'r,107 W. Va. 583, 149 S.E. 824 (1929).

". . . it is . . . axiomatic that the employer, by subscribing to the workmen's compensation fund, does not thereby become the employee's insurer against all ills or injuries which may befall him." Id. (citing Barnett v. State Workmen's Compensation Comm'r, 153 W. Va. 796, 172 S.E.2d 698 (1970) and James v. Rinehart & Dennis Co., Inc., 113 W. Va. 414, 168 S.E. 482 (1933)).

"In order to establish compensability an employee who suffers a disability in the course of his employment must show by competent evidence that there was a causal connection between such disability and his employment." Deverick v. State Workmen's Compensation Director, 150 W. Va. 145, 144 S.E.2d 498 (1965) (Syl.pt. 3).

Phrases "in the course of employment" and "resulting from employment" are not synonymous, and both elements must concur in order to make a workers' compensation claim compensable. Emmel v. State Compensation Director, 150 W.Va. 277, 145 S.E.2d 29 (1965).

The Court in Emmel, supra, noted that the circumstances surrounding the particular injury must be considered on a case by case basis to determine compensability. The Court stated that, "[a]n injury, to be compensable, must have occurred in the course of and resulting from the employment and it is not enough to say that the activity in which the injury occurred was a vague incident of employment." Id. at 284, 34.

The issue in litigation before the Office of Judges was the claimant's protest to the order denying the claim for an alleged knee injury. In order for a claim to be held compensable, the claimant must establish that he sustained "an injury," which occurred "in the course of" and "resulted from" his employment. In the instant claim, based upon the lack of a causal connection

between the claimant's work and his knee popping, the claimant has failed to establish that he sustained an injury in the course of and resulting from his employment.

The claimant's counsel introduced the King v. Constellium Rolled Products case, which is a Memorandum Decision from the West Virginia Supreme Court issued on December 6, 2019. In King, the Court affirmed the lower rulings denying the claim since the claimant's knee injury did not result from his employment. The instant claim is not distinguishable from the King case. In King, the claimant was walking across the parking lot into work when his right knee popped. He did not trip or stumble on anything. The Court agreed that the claimant "was not performing an action unique to his employment at the time of his injury, the injury did not occur as a result of his employment." Accordingly, the Court determined that the claimant did not establish that his injury occurred as a result of his employment.

The claimant in the subject claim has indicated that he was stepping down onto a step when he felt his knee pop. The claimant's indication on the WC-1 form, statements to medical personnel, and testimony during his deposition are consistent that he was descending stairs when he felt his knee pop. He also indicated that he texted his supervisor immediately afterward and told her that he blew out his knee.

The claimant advised personnel at Wheeling Hospital on May 1, 2020 that he was walking down the steps at work and felt a pop to his right knee. The impression of the x-ray done on May 1st was degenerative changes with a possible small effusion. On May 5 and 11, 2020, he likewise advised medical personnel that he was walking down steps from a client's patio when he experienced a popping sensation to his right knee.

During the claimant's deposition, he indicated that he stepped down on the first step with his left leg with no issues. He transferred his weight and stepped down on the second step with

his right foot, which is when he felt the pain and heard the pop. He agreed that he was not carrying anything, there was a handrail, and the steps were in good condition.

The claim administrator properly denied this claim since the claimant's knee condition did not result from his employment. The claimant has likely established that he was in the course of his employment since he was exiting a client's home and walking to his work van following a delivery. The claimant has not established; however, that the right knee condition resulted from his employment. The right knee popping when he stepped down a regular set of steps that were in good condition, had a handrail, and was not carrying anything nor did he slip or trip, did not result from his employment.

The Administrative Law Judge thoroughly analyzed the facts related to the alleged knee injury. Judge Atkins explained that the Court's analysis in the King case is not helpful to the claimant's case because the Court affirmed a denial of compensability and emphasized that the claimant, Mr. King, was walking and did not trip, slip, or fall when he felt a pop in his knee. Judge Atkins recognized a slightly different case in the subject claim since the claimant was walking down steps; however, he explained that like the King case, the claimant was not carrying any materials and did not slip, trip, or fall. The subject claimant merely took a step down a stair and his knee became symptomatic. Judge Atkins concluded that the claimant did not establish an injury that resulted from his employment. The claimant simply did not establish an injury that occurred in the course of and also resulted from his employment and the Office of Judges properly affirmed the denial of the claim. Likewise, the Board of Review's order affirming the lower rulings was not clearly wrong.

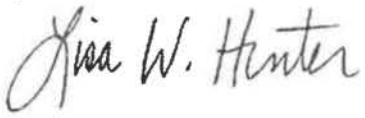
V. CONCLUSION

Based upon the foregoing, the employer submits that the Board of Review's order affirming the Administrative Law Judge's Decision dated February 4, 2021, which affirmed the

claim administrator's order dated May 21, 2020 denying the claim is not in clear violation of a constitutional or statutory provision, is not clearly the result of erroneous conclusions of law, nor is it based upon material findings of fact that are clearly wrong. Therefore, the employer respectfully requests that this Honorable Court affirm the Board of Review's August 23, 2021 order.

Thank you for your attention to this matter.

Respectfully submitted,
Lincare Holdings, Inc.
By Counsel



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CERTIFICATE OF SERVICE

I, Lisa Warner Hunter, attorney for the Respondent, Lincare Holdings, Inc., hereby certify that a true and exact copy of the foregoing "Brief on Behalf of Respondent, Lincare Holdings, Inc." was served upon the Petitioner by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 12th day of October 2021 addressed as follows:

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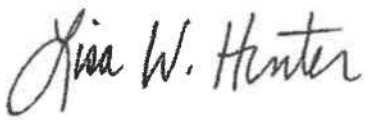

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