

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**JAMES L. KIRK,
Claimant Below, Petitioner**

v.) No. 24-ICA-190 (JCN: 2023003296)

**WEST VIRGINIA PAVING, INC.,
Employer Below, Respondent**

**FILED
October 28, 2024**

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

MEMORANDUM DECISION

Petitioner James L. Kirk appeals the April 5, 2024, order of the Workers' Compensation Board of Review ("Board"). Respondent West Virginia Paving, Inc., ("WVP") filed a response.¹ Mr. Kirk did not reply. The issue on appeal is whether the Board erred in affirming the claim administrator's order, which denied a request to add strain of lower back, strain of abdominal muscle, lumbar radiculopathy, and low back pain as compensable conditions of the claim.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2024). 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.

Prior to the compensable injury, Mr. Kirk was seen and received treatment for back pain, left hip pain, left leg pain, and sciatica several times from September 2019 through July 2020. Mr. Kirk underwent a lumbar MRI on October 5, 2019, revealing degenerative changes in the form of ligamentous prominence and bilateral facet joint hypertrophy, L5-S1 disc space narrowing, disc desiccation, and an extradural defect that appeared to be a broad-based disc herniation producing mild to moderate impress on the anterior aspects of the thecal sac.

Mr. Kirk was seen by Robert Crow, M.D., on October 8, 2019, with complaints of low back and lower extremity pain. Mr. Kirk reported that he had suffered from intermittent low back pain for a number of years. Dr. Crow assessed the claimant with low back pain, left leg pain, left S1 radiculopathy, and an L5-S1 disc herniation. Mr. Kirk underwent an

¹ Mr. Kirk is represented by Reginald D. Henry, Esq., and Lori J. Withrow, Esq. WVP is represented by Steven K. Wellman, Esq., and James W. Heslep, Esq.

L5-S1 microdiscectomy in October 2019. On July 13, 2020, Mr. Kirk underwent an MRI of his lumbar spine revealing post-operative changes in the paravertebral soft tissues at the L5 level, L5-S1 disc and endplate signal abnormalities likely related to discogenic degenerative change and postoperative changes, and moderate bilateral neural foraminal narrowing at L5-S1. The record indicates Mr. Kirk treated with George Bryant, PA, through July 5, 2022 (one month prior to the compensable injury), during which he was noted as having low back and lower extremity symptoms. On July 5, 2022, PA Bryant diagnosed Mr. Kirk with back pain, multiple joint pain, and lumbar radiculopathy.

On August 5, 2022, while employed by WVP, Mr. Kirk sustained an injury to his lower back and stomach while pulling himself onto a safety rack at work. The Employees' and Physicians' Report of Occupational Injury dated August 8, 2022, indicates that Mr. Kirk sustained an occupational injury to his lower back and his abdomen, and his injury aggravated a preexisting condition. The treatment provider placed Mr. Kirk on modified duty. On August 16, 2022, the claim administrator issued an order holding the claim compensable for strain of abdomen and lower back.

Mr. Kirk was seen by Tommy Holbrook, D.O., on August 8, 2022, for his compensable back injury. Dr. Holbrook diagnosed strain of the abdomen and sprain of the ligaments of the lumbar spine. Dr. Holbrook administered an injection to Mr. Kirk and recommended physical therapy and medication. Mr. Kirk was released to modified work duty. On October 8, 2022, Mr. Kirk underwent a lumbar MRI revealing degenerative changes and significant degenerative disc disease with neural foraminal encroachment at L5-S1. On October 10, 2022, Mr. Kirk was seen by PA Bryant, who assessed lumbar radiculopathy and strain of abdominal muscle.

On October 20, 2022, Mr. Kirk was seen by Christopher McKinless, D.O. Dr. McKinless noted Mr. Kirk's worsening back pain, bouts of incontinence, left leg numbness and tingling. He further noted Mr. Kirk's prior history of back surgery, lumbosacral radiculopathy, and back pain. Dr. McKinless assessed foraminal stenosis of the lumbar region and low back strain.

Mr. Kirk underwent a neurosurgical evaluation with Richard Douglas, M.D., on November 17, 2022. Dr. Douglas noted that Mr. Kirk's radicular pain subsided following an L5-S1 laminectomy surgery approximately three years ago, but he experienced an onset of low back and radicular pain following his work injury in August of 2022. Dr. Douglas assessed lumbar radiculopathy affecting the left lower extremity in an L5 dermatomal distribution and history of lumbar discectomy. He recommended a lumbar MRI to assess interval changes and a nerve root block at L5-S1 on the left. Mr. Kirk underwent a lumbar MRI on December 12, 2022, revealing postoperative changes at L5-S1 with some disc bulging toward the right side and an associated osteophyte complex on the right, and facet arthropathy with moderate right foraminal narrowing and mild to moderate left foraminal narrowing at L5-S1.

On December 16, 2022, Mr. Kirk followed up with PA Bryant, who assessed lumbar facet joint pain, low back pain, lumbar radiculopathy, and spinal stenosis of lumbar regions. He referred Mr. Kirk to physical therapy. On January 19, 2023, Mr. Kirk underwent a transforaminal nerve root injection at the left S1 level. Mr. Kirk was seen by PA Bryant again on February 3, 2023. PA Bryant noted that Mr. Kirk reported having spasms along his lumbar spine, weakness in the left leg, and a loss of feeling in the bottom of his feet. PA Bryant indicated that Mr. Kirk was temporarily and totally disabled, with an estimated trial return date of June 15, 2023, or a modified duty return date of July 1, 2023. PA Bryant recommended that Mr. Kirk receive a second neurological opinion from Raymond Harron, D.O.

Mr. Kirk followed up with Dr. Douglas on February 16, 2023. Mr. Kirk reported continued lumbar pain with pain radiating into the left lower extremity and left foot numbness. Mr. Kirk further reported that he had tried physical therapy and medicine without any significant improvement, and his symptoms were negatively affecting his activities of daily living and his quality of life. Dr. Douglas assessed radicular leg pain, ambulatory dysfunction, gait instability, leg cramping, degenerative disc disease, lumbar spondylosis, and a history of lumbar laminectomy. Dr. Douglas recommended continued conservative treatment and a referral to Andrew Thymius, D.O., for injection therapy, and requested MRIs of the thoracic spine, the brain, and pelvis. Dr. Douglas noted that the thoracic and brain MRIs were needed to evaluate Mr. Kirk's instability and lower extremity cramping and spasms, and the pelvic MRI would assess for a lumbosacral plexus mass.

On February 22, 2023, Mr. Kirk was evaluated by Chuan Fang Jin, M.D. Dr. Jin noted that Mr. Kirk injured his back on August 5, 2022, while pulling on a heavy safety rack at work. She further noted that Mr. Kirk had returned to work, but then stopped working three months later because he could no longer tolerate the pain. Mr. Kirk reported constant pain in his low back that radiated down the left leg to the foot, and constant numbness in both feet. Dr. Jin opined that on August 5, 2022, Mr. Kirk sustained an abdominal wall strain and a lumbar sprain, but that his current symptoms were a result of an aggravation of his preexisting conditions. Dr. Jin further opined that there was no indication for another neurosurgical evaluation because sprains typically heal within a few weeks. The claim administrator issued an order dated March 3, 2023, granting TTD benefits from March 3, 2023, through March 9, 2023.

Dr. Jin drafted a supplemental report dated March 4, 2023, in which she opined that Mr. Kirk's current symptoms were due to preexisting degenerative disease, that the compensable injury requires no further medical treatment, that additional injection therapy was not indicated, and that the requests for the MRIs and neurosurgical care should be denied. Mr. Kirk followed up with PA Bryant on March 10, 2023, and reported continued back pain. PA Bryant requested a functional capacity evaluation. On March 30, 2023, the claim administrator issued an order closing the claim for TTD benefits. Mr. Kirk protested.

On April 25, 2023, Mr. Kirk was seen by PA Bryant, who noted his chronic back pain, that he had tried epidural steroid injections and physical therapy without benefit, and he was not a surgical candidate. Mr. Kirk reported intermittent pain shooting down his left leg and into his foot consistent with sciatica. PA Bryant assessed lumbar radiculopathy, atrial premature complex, coronary atherosclerosis, essential hypertension, impingement syndrome of the left shoulder, lumbosacral radiculitis, mixed hyperlipidemia, osteoarthritis, spinal stenosis of lumbar region, strain of abdominal muscle, and chronic obstructive lung disease. PA Bryant again recommended a neurosurgical referral to Dr. Harron.

On April 26, 2023, the claim administrator issued an order denying the request for a referral to Dr. Harron for a neurosurgical second opinion and the request for the MRIs of the thoracic spine, brain, and pelvis. Mr. Kirk protested this order.²

Mr. Kirk was seen by Dr. Harron on May 8, 2023. Dr. Harron assessed postlaminectomy syndrome, pain in the lower back, lumbar radiculopathy, lumbar disc degeneration, lumbar disc displacement, and lumbar spondylosis. Dr. Harron recommended a bilateral L5-S1 laminectomy/foraminotomy with adhesion lysis. Mr. Kirk underwent surgery on May 26, 2023, and the post-operative diagnosis was post-laminectomy syndrome with recurrent low back pain and lower extremity radiculopathy and neurogenic claudication with recurrent spinal stenosis and foraminal stenosis at the L5-S1 level. Mr. Kirk followed up with Dr. Harron on June 12, 2023, and reported that he was pleased with his progress following surgery. In a letter dated June 22, 2023, Dr. Harron stated Mr. Kirk was to remain off work until his return appointment on July 21, 2023.

On April 5, 2024, the Board issued an order affirming the claim administrator's order, which denied a request to add strain of lower back, strain of abdominal muscle, lumbar radiculopathy, and low back pain as compensable conditions of the claim. The Board found that Mr. Kirk failed to establish that his lumbar radiculopathy constituted a discrete new injury rather than an aggravation of a preexisting condition. The Board further found that back pain is a symptom and not a diagnosis that can be held compensable. Mr. Kirk now appeals the Board's order.³

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

² Neither the March 30, 2023, Order closing the claim for temporary total disability benefits nor the April 26, 2023, Order denying a neurosurgical second opinion and requests for MRIs of the thoracic spine, brain, and pelvis are at issue in the instant appeal.

³ We note, as did the Board, that strain of the lower back and abdominal strain are already compensable conditions in this claim, thus, those conditions will not be addressed.

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.

Syl. Pt. 2, *Duff v. Kanawha Cnty. Comm'n*, __ W. Va. __, 905 S.E.2d 528 (2024).

On appeal, Mr. Kirk argues that Dr. Douglas, his neurosurgeon, noted that his previous radicular pain had subsided following his surgery approximately three years ago after his laminectomy, but that he recently had an onset of radicular pain following the work injury on August 5, 2022. Mr. Kirk further argues that his new symptoms, including falling, difficulty in completing activities of daily living, incontinence, and the inability to perform his job duties arose after the compensable injury occurred, and shows that he did, in fact, suffer from a new discrete injury.

The Supreme Court of Appeals of West Virginia held, in *Gill v. City of Charleston*, 236 W. Va. 737, 783 S.E.2d 857 (2016):

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.

Id. at 738, 783 S.E.2d at 858, syl. pt. 3.

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.

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

Here, the Board found that the requested diagnosis of lumbar radiculopathy was symptomatic prior to the compensable injury and did not arise as a result of the compensable injury. The Board noted that Dr. Crow and PA Bryant both document that Mr. Kirk complained of low back pain with radiating pain and paresthesias down the left lower extremity from May 4, 2020, through July 5, 2022. Thus, the Board found that the radiculopathy was “significantly symptomatic” prior to the compensable injury and does not constitute a new discrete new injury within the meaning of *Gill* and *Moore*.

Upon review, we conclude that the Board was not clearly wrong in finding that Mr. Kirk failed to establish that his lumbar radiculopathy constituted a discrete new injury rather than an aggravation of a preexisting condition. 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 lumbar radiculopathy was symptomatic prior to the compensable injury and is not a compensable condition. Further, we conclude that the Board is not clearly wrong in finding that low back pain is a symptom rather than a compensable diagnosis. *See Harpold v. City of Charleston*, No. 18-0730, 2019 WL 1850196, at *3 (W. Va. Apr. 25, 2019) (memorandum decision) (holding that left knee pain is a symptom, not a diagnosis, and therefore cannot be added to a claim).

Accordingly, we affirm the Board’s April 5, 2024, order.

Affirmed.

ISSUED: October 28, 2024

CONCURRED IN BY:

Judge Charles O. Lorensen

Judge Daniel W. Greear

Chief Judge Thomas E. Scarr, not participating