

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

**ACNR RESOURCES, INC.,  
Employer Below, Petitioner**

**v.) No. 24-ICA-223** (JCN: 2024007693)

**JONATHAN BAILEY,  
Claimant Below, Respondent**

**FILED  
October 28, 2024**

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

**MEMORANDUM DECISION**

Petitioner ACNR Resources, Inc. (“ACNR”) appeals the May 2, 2024, order of the Workers’ Compensation Board of Review. Respondent Jonathan Bailey timely filed a response.<sup>1</sup> ACNR did not reply. The issue on appeal is whether the Board erred in reversing the claim administrator’s order, which had denied the claim, and holding the claim compensable, as well as granting temporary total disability benefits (“TTD”) from October 26, 2023, to January 2, 2024.

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 reported injury at issue in this case, which occurred on October 23, 2023, Mr. Bailey was seen by Dana Mears, M.D., on October 29, 2014, regarding pain in his knees. Dr. Mears’ impression was bilateral degenerative joint disease in both knees. Mr. Bailey followed-up with Dr. Mears regarding his bilateral knee pain on October 22, 2015. Dr. Mears noted that Mr. Bailey could flex his left knee to 115 degrees. The range of motion in Mr. Bailey’s arthritic right knee was greatly limited, and he reported increased pain in the right knee following physical therapy. Dr. Mears’ impression was left unilateral primary osteoarthritis, left presence of artificial knee joint, and right unilateral primary osteoarthritis. Dr. Mears discussed the possibility of a total right knee replacement with Mr. Bailey.

On January 18, 2018, Mr. Bailey saw Dr. Mears regarding right knee pain that had progressively worsened. An x-ray of the right knee revealed severe degenerative joint

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<sup>1</sup> ACNR is represented by Aimee M. Stern, Esq. Mr. Bailey is represented by J. Thomas Greene, Jr., Esq., and T. Colin Greene, Esq.

disease and joint space narrowing to bone-on-bone with peripheral osteophytes and subchondral sclerosis. Dr. Mears' impression was unilateral primary osteoarthritis of the right knee, and presence of left artificial knee joint. Mr. Bailey received an injection in the right knee.

On April 27, 2022, Mr. Bailey was seen by Michael Myers, D.O., regarding his chronic right knee pain. Mr. Bailey reported that he had undergone right knee arthroscopy in 2014 and had a total left knee replacement surgery in 2015. Dr. Myers' physical examination revealed full extension in the right knee, but right knee flexion was limited to about 95 degrees. An x-ray of the right knee revealed medial and lateral bone-on-bone arthrosis and patellofemoral arthrosis with a loose body noted. Dr. Myers' assessment was primary osteoarthritis of the right knee. Mr. Bailey indicated that he wished to proceed with a total right knee arthroplasty. When Mr. Bailey returned to Dr. Myers on December 21, 2022, he reported pain in his right ankle and right knee. Dr. Myers assessed osteoarthritis of the right mid foot, posterior tibial tendon dysfunction, right knee pain, and primary osteoarthritis of the right knee. Dr. Myers recommended that Mr. Bailey have his right ankle evaluated before undergoing a total right knee arthroplasty.

On May 15, 2023, Dr. Myers examined Mr. Bailey following surgery on his right foot. Although Mr. Bailey wished to proceed with a total right knee arthroscopy, Dr. Myers instructed Mr. Bailey to lose weight before undergoing the procedure. An x-ray of the right knee revealed worsening osteoarthritis involving all three compartments of the right knee.

Turning to the incident at issue in this appeal, Mr. Bailey completed an Employees' and Physicians' Report of Occupational Injury or Disease on October 23, 2023, in which he indicated that he suffered a work injury that day when he lost his footing and landed on his right knee while at work. The physician's section of the form was completed by medical personnel at WVU Medicine Wheeling Hospital on October 23, 2023, and indicated that Mr. Bailey sustained an occupational injury resulting in right knee pain and a right knee contusion.

On October 26, 2023, Mr. Bailey was seen by Ross Tennant, NP. Mr. Bailey reported that he tripped and fell at work striking his right knee on the ground, and that he was experiencing significant pain and decreased motion in his right knee. Mr. Bailey also indicated that he was scheduled to have a total right knee replacement with Dr. Myers earlier in the year, but that the surgery had to be postponed due to his body mass index. NP Tennant noted that Mr. Bailey was seen in the emergency department where imaging studies revealed advanced degenerative changes and an intra-articular loose body. Further, NP Tennant indicated that Mr. Bailey had been using crutches, and had been non-weightbearing on the right lower extremity. Importantly, NP Tennant diagnosed a contusion of the right knee and recommended physical therapy and an MRI of the right knee to evaluate for possible internal derangement. Mr. Bailey was instructed to remain off work until November 9, 2023.

By order dated October 30, 2023, the claim administrator denied Mr. Bailey's claim based on a finding that Mr. Bailey's "current condition" appeared to be preexisting and that prior to the alleged injury, he had scheduled knee replacement surgery. Mr. Bailey protested this order.

Mr. Bailey followed-up with NP Tennant on November 9, 2023, and he reported that although he had started physical therapy, he was still experiencing significant swelling and discomfort in his right knee. NP Tennant's physical examination revealed small effusion and tenderness to palpitation over the right knee and he diagnosed contusion of the right knee. NP Tennant noted that flexion-extension of the right knee remained limited.

On December 13, 2023, Mr. Bailey was seen by Dr. Myers, and he complained of continued right knee pain. Mr. Bailey reported a work-related injury to his right knee in October and indicated that he had been off work since that time. Dr. Myers' assessment was right knee pain and localized osteoarthritis of the right knee. Mr. Bailey indicated that he wished to proceed with a right total knee arthroscopy.

Mr. Bailey was deposed on December 18, 2023. He testified that on October 23, 2023, he was working as a section mechanic in a coal mine, and he walked around a disabled shuttle car when he slipped on a large pile of mine refuse and fell, landing directly on his right knee. Mr. Bailey indicated that he could hardly walk following the incident. Mr. Bailey further testified that he participated in physical therapy for a couple of weeks. Mr. Bailey stated that he was not having any difficulty walking when he reported for work on October 23, 2023, but that following the injury he had difficulty walking, and developed stiffness, swelling, and loss of motion in his right knee.

Mr. Bailey followed-up with NP Tennant on December 22, 2023, and reported significant discomfort in his right knee. NP Tennant's examination of the right knee revealed small effusion and tenderness to palpitation throughout the right knee. NP Tennant noted that there was adequate flexion and extension in the right knee. NP Tennant's assessment was contusion of the right knee and Mr. Bailey was instructed to remain off work.

On December 29, 2023, Mr. Bailey was again seen by NP Tennant. Mr. Bailey requested that he be released to return to full duty work, and he indicated that he was still experiencing discomfort in his right knee but that it was manageable. NP Tennant's physical examination revealed improved edema to the right knee, and tenderness to palpitation over both mediolateral joint lines. Mr. Bailey performed full flexion and extension of the right knee, and he ambulated with a steady gait. NP Tennant released Mr. Bailey to return to work without restrictions on January 2, 2024.

On May 2, 2024, the Board issued an order reversing the claim administrator's order and holding the claim compensable for right knee contusion, as well as granting TTD

benefits from October 26, 2023, to January 2, 2024. The Board concluded that although Mr. Bailey had a symptomatic preexisting degenerative condition in his right knee, the record clearly demonstrated that he fell and injured his right knee in the course of and resulting from his employment on October 23, 2023. The Board also noted that several medical providers diagnosed Mr. Bailey with a right knee contusion as a direct result of his slip and fall work injury. It is from this order that ACNR now appeals.

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.

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

On appeal, ACNR argues that the Board erred in holding the claim compensable for a right knee contusion because Mr. Bailey's medical records failed to document any exam findings to support that diagnosis. Further, ACNR argues that the Board was clearly wrong in concluding that Mr. Bailey suffered a discrete new injury to his right knee when his medical records document repeated recommendations to undergo total right knee arthroplasty, and his symptoms and objective findings did not change after the alleged injury. 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 of review in mind, we cannot conclude that the Board was clearly wrong in reversing the claim administrator's order and holding the claim compensable for right knee contusion, as well as granting TTD benefits.

In order for a claim to be held compensable, three elements must coexist: (1) a personal injury, (2) received in the course of employment, and (3) resulting from that employment. Syl. Pt. 1, *Barnett v. State Workmen's Comp. Comm'r*, 153 W. Va. 796, 172 S.E.2d 698 (1970).

Further, as 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. IGC 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.

Upon review, we conclude that the Board was not clearly wrong in reversing the claim administrator's order and holding the claim compensable for right knee contusion. Here, the Board found that the weight of the evidence establishes that Mr. Bailey sustained a discrete new injury to his right knee in the form of a knee contusion, which resulted from his employment. The Board noted that Mr. Bailey testified that he injured his right knee when he slipped and fell while performing his job duties as a mine section mechanic.

Although ACNR argues that the Board erred in holding the claim compensable for a right knee contusion, the Board determined that the medical treatment providers documented a diagnosis of contusion of the knee following the workplace injury. Further, while ACNR argues that the Board was clearly wrong in finding that Mr. Bailey suffered a discrete new injury, the Board found that the medical reports from Wheeling Hospital

and NP Tennant corroborated Mr. Bailey’s testimony, and that there was no evidence of record to refute his testimony regarding the right knee injury. Also, the Board noted that Mr. Bailey testified that he was fully capable of performing his full duty work without restrictions prior to the work injury of October 23, 2023, and that the record shows that he was physically unable to continue working for a period of time following the work injury.<sup>2</sup> Based on the foregoing, we conclude that the evidence is sufficient to support the Board’s order reversing the claim administrator’s order and holding the claim compensable for a right knee contusion, and we give deference to its weighing of the evidence and determinations of credibility. *See W. Va. Off. of Ins. Comm’r v. Johns*, No. 21-0811, 2023 WL 3968686, at \*3 (W. Va. June 13, 2023) (memorandum decision) (“This Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the Board of Review[.]”).

Accordingly, we affirm the Board’s May 2, 2024, order.

Affirmed.

**ISSUED:** October 28, 2024

**CONCURRED IN BY:**

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

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<sup>2</sup> Specifically, the record shows that NP Tennant took Mr. Bailey off work from approximately October 26, 2023, through January 2, 2024, due to the compensable right knee contusion.