

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**B E T, LTD.,
Employer Below, Petitioner**

v.) No. 24-ICA-296 (JCN: 2021006223)

**JAMES R. MAY,
Claimant Below, Respondent**

**FILED
February 28, 2025**

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

MEMORANDUM DECISION

Petitioner B E T, Ltd., (“B E T”) appeals the July 10, 2024, order of the Workers’ Compensation Board of Review (“Board”). Respondent James R. May did not file a response.¹ The issue on appeal is whether the Board erred in reversing the claim administrator’s order, which rejected 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.

Mr. May submitted an Employees’ and Physicians’ Report of Occupational Injury dated September 29, 2020, indicating that on September 18, 2020, he injured his back while lifting a heavy pallet jack. The physician’s portion of the application was completed by Larry Lucas, D.O. Dr. Lucas indicated that Mr. May had sustained an occupational injury resulting in a lumbar strain.

On October 21, 2020, the claim administrator issued an order denying Mr. May’s application for benefits. On November 6, 2020, the claim administrator issued an order denying authorization for physical therapy for the lower back. Mr. May protested both orders. By decision dated July 7, 2021, the Office of Judges (“OOJ”) affirmed the claim administrator’s orders. On January 20, 2022, the Board issued an order affirming the OOJ decision. On October 23, 2023, the Supreme Court of Appeals of West Virginia issued a Memorandum Decision, which reversed the Board’s order, and remanded the claim for

¹ B E T is represented by James W. Heslep, Esq. Mr. May is represented by Patrick K. Maroney, Esq.

further development of the evidentiary record and analysis under *Moore v. ICG Tygart Valley, LLC*, 247 W.Va. 292, 879 S.E.2d 779 (W. Va. 2022).

Prior to the alleged injury, Mr. May received treatment for low back pain. For instance, Nicholas Bremer, M.D., treated Mr. May on May 7, 2019, for chronic low back and hip pain. Mr. May reported that he had been having low back pain that occasionally radiated down the posterior aspect of both lower extremities to the knees for approximately six months, and his symptoms had progressively worsened. Mr. May further reported that pain medications provided 40% to 50% pain relief for one month. Dr. Bremer assessed sacroiliitis, lumbosacral spondylosis, lumbar radiculopathy, and chronic pain syndrome. Further, Mr. May was seen by Kelley Whoolery, PA-C, four times from September 4, 2019, through September 23, 2020, and he received treatment for back pain.

Following the alleged injury, on September 23, 2020, Mr. May was seen by PA-C Whoolery. Mr. May reported that he had twisted his back at work four days prior while pulling on a jack at work. Mr. May reported low back pain that radiated down his left leg to the left foot. Mr. May further reported that sitting, walking, and changing positions were painful. PA-C Whoolery noted this was not a workers' compensation injury and that Mr. May had been declining PT orders. PA-C Whoolery assessed Mr. May with a backache and lumbar radiculopathy, and she recommended that Mr. May reconsider PT. PA-C Whoolery completed a Return to Work slip on September 28, 2020, indicating that Mr. May was to remain off work from September 28, 2020, through October 2, 2020.

Mr. May was seen by Dr. Lucas on September 29, 2020. Mr. May reported that he was pulling a pallet of ammunition at work when he suffered a sudden onset of severe low back pain. Dr. Lucas noted that Mr. May's gait was unsteady. Dr. Lucas assessed acute low back pain and muscle spasm in the back. A CT scan of Mr. May's lumbar spine performed on September 29, 2020, revealed mild degenerative changes in the lumbar spine.

On October 6, 2020, Mr. May was seen by Richard Knapp, M.D. Mr. May reported significant low back pain with occasional pain down the left leg following a work injury. Mr. May reported that he had started PT but noted little improvement so far. Mr. May stated that his physical therapist informed him that he had a slipped disc. Mr. May stated that he was scheduled to return to work the next day, but he did not think he could go. Dr. Knapp ordered a lumbar MRI, prescribed Toradol, and instructed Mr. May to continue with PT. Dr. Knapp completed a work excuse dated October 6, 2020, indicating that Mr. May was to remain off work until October 21, 2020, and was to avoid any lifting, pushing, or pulling.

Mr. May was deposed on March 15, 2021, and again on March 25, 2024. Mr. May testified that on September 18, 2020, one of his co-workers swung a pallet of ammo around on a pallet jack, and when Mr. May went to catch or grab the pallet, his back gave out. Mr.

May stated that he had an immediate onset of intense lower back pain that radiated into his left leg and across his back. Mr. May testified that when he started his shift that morning, he felt fine and was not having any problems with his back. Mr. May stated that a day or so after the injury, he reported the injury to the store manager, who told him to fill out an incident report, which he did. Mr. May reported some back problems when he was younger, but those problems had never prevented him from working or performing his daily activities. Mr. May characterized his pre-injury low back symptoms as muscle spasms and aches. Mr. May testified that following his work injury, he required a cane to walk, and he continues to have symptoms whenever he lifts anything. Mr. May stated that prior to the work injury, Dr. Bremer had treated his low back pain with steroid injections and muscle relaxers. Mr. May testified that his back pain improved following the injections, and he only took the muscle relaxers when he needed them. Mr. May testified that low back symptoms following the work injury were more severe than his pre-injury symptoms. Mr. May stated that he could not recall if he had pain in his legs prior to the work injury. Mr. May testified that his low back improved with four weeks of PT, and he no longer required the use of a cane.

The record contains an undated recorded interview of Mr. May. Mr. May described his injury and stated that he believed he submitted an incident report regarding the injury on September 21, 2020. Mr. May reported that he had been having problems with his back for a long time, but it had never affected his ability to work prior to the recent injury. Mr. May stated that he did not initially tell his doctor that his injury was a workers' compensation injury.

On July 7, 2021, the Office of Judges ("OOJ") issued a decision affirming the claim administrator's rejection of the claim. The OOJ found that Mr. May failed to establish that he suffered a discrete new injury separate from his preexisting back pain. On January 20, 2022, the Board affirmed the OOJ's decision. The Supreme Court of Appeals of West Virginia issued a memorandum decision dated October 23, 2023, which reversed the Board's order and remanded the claim for further proceedings. The Supreme Court found that it was clear that Mr. May had a preexisting back condition, however, it was unclear what symptoms, if any, he was experiencing prior to his occupational injury. Thus, the Supreme Court remanded the claim and instructed the Board to perform an analysis of the claim under *Moore*.

Following the remand, on July 10, 2024, the Board reversed the claim administrator's order, which rejected the claim.² The Board found that the medical evidence establishes that Mr. May sustained a discrete new injury in the course of and resulting from his employment. BET now appeals the Board's order.

² The Board reopened the evidentiary record on remand and additional evidence, including the second deposition, was added to the record.

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*, 250 W. Va. 510, 905 S.E.2d 528 (2024).

B E T argues that the Board failed to adequately consider Mr. May's history of preexisting low back symptoms. Further, BET argues that the Board failed to adequately address "multiple instances in which the claimant attempted to obfuscate his history of pre-existing conditions during the discovery process." We disagree.

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*, 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 analyzed the claim under *Gill* and *Moore* and determined that Mr. May established that he sustained a discrete new injury in the course of and resulting from his employment. The Board noted that although Mr. May's statements regarding his preexisting back issues were inconsistent, his statements regarding the work injury have been consistent. Further, the Board found that "There is no credible evidence of record to refute Mr. May's statements regarding the work injury, and there is no credible medical evidence to refute Dr. Lucas' diagnosis of an occupational injury resulting in a lumbar strain."

Upon review, we conclude that the Board was not clearly wrong in finding that Mr. May established that he suffered a discrete new injury in the course of and resulting from his employment. Importantly, as the Board noted, BET has produced no credible evidence to refute Mr. May's testimony regarding his injury. 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 rejecting the claim.

Further, we will defer to the Board's credibility determinations regarding Mr. May's testimony. *See Martin v. Randolph Cnty. Bd. of Educ.*, 195 W. Va. 297, 306, 465 S.E.2d 399, 408 (1995) ("We cannot overlook the role that credibility places in factual determinations, a matter reserved exclusively for the trier of fact. We must defer to the ALJ's credibility determinations and inferences from the evidence . . .").

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

Affirmed.

ISSUED: February 28, 2025

CONCURRED IN BY:

Chief Judge Charles O. Lorensen

Judge Daniel W. Greear

Judge S. Ryan White