

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**CONSOL BAILEY MINE WV,
Employer Below, Petitioner**

v.) No. 24-ICA-352 (JCN: 2023005630)

**STEPHEN M. POLINSKI,
Claimant Below, Respondent**

**FILED
June 6, 2025**

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

MEMORANDUM DECISION

Petitioner Consol Bailey Mine WV (“Consol”) appeals the August 7, 2024, order of the Workers’ Compensation Board of Review (“Board”). Respondent Stephen M. Polinski timely filed a response.¹ Consol did not file a reply. The issue on appeal is whether the Board erred in modifying the claim administrator’s order and adding tear of the right rotator cuff as a compensable condition in 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.

A Consol Bailey Mine Incident report dated August 30, 2022, indicated that on the same date, Mr. Polinski sustained a neck and shoulder strain when he was riding in a mantrip that had a head on collision with another mantrip. The report indicated that Mr. Polinski was employed as an Electrician by Consol. It was reported that Mr. Polinski continued to work and finished his shift. Mr. Polinski completed an Employees’ and Physicians’ Report of Occupational Injury or Disease dated September 13, 2022. He reported that on August 30, 2022, he sustained a sprain/strain to his neck/right shoulder.

Mr. Polinski was seen by Kristy Dobson, NP, on September 21, 2022, regarding his right shoulder and neck pain. Mr. Polinski reported that he was on a mantrip that carried miners to and from the job site, when it collided with another mantrip and jerked his neck and right shoulder. NP Dobson assessed right shoulder pain, cervical sprain, and traumatic tear of the supraspinatus tendon of right shoulder.

¹ Consol is represented by Toni J. Williams, Esq. Mr. Polinski is represented by Sandra K. Law, Esq.

On September 29, 2022, an MRI of the right shoulder revealed edema at the anterior insertional fibers of supraspinatus and adjacent greater tuberosity, suggesting tendinopathy with reactive edema, no full-thickness or retracted cuff tears, mild osteoarthritis, and no joint effusion. On September 30, 2022, a CT of the right shoulder revealed no evidence of a full-thickness rotator cuff tear, mild osteoarthritis, and upper lobe pulmonary nodules. On October 3, 2022, the claim administrator held the claim compensable for strain of muscle, fascia, and tendon neck/right shoulder level.

On October 17, 2022, a Mine Accident, Injury, and Illness Report was completed. The date of the accident was listed as August 30, 2022. It was reported that Mr. Polinski braced himself in the mantrip in which he was sitting, when he was struck by another mantrip. It was noted that Mr. Polinski developed pain in his right shoulder, and that he worked all scheduled days until October 4, 2022, when he was taken off work.

Mr. Polinski was seen by Michael D. Myers, D.O., on November 21, 2022, regarding his right shoulder pain. Dr. Myers assessed tendinopathy of the right shoulder. Dr. Myers noted that Mr. Polinski had a small partial bursal sided tear of the supraspinatus/tendinopathy. Dr. Myers indicated that he would treat Mr. Polinski's right shoulder with an injection and see if it improves within four to six weeks.

On January 18, 2023, Mr. Polinski followed up with Dr. Myers, who assessed work related injury, tendinopathy of the right shoulder, right shoulder pain, unspecified chronicity, bone cyst of humerus, and disorder of bursae and tendons in right shoulder region. Dr. Myers noted that Mr. Polinski wished to proceed with arthroscopy of the right shoulder. On the same date, Dr. Myers requested authorization for WRS cold compression therapy; right shoulder arthroscopy; subacromial decompression; evaluation and treatment of humeral head cyst with possible bone graft; a post-operative shoulder brace; and post-operative physical therapy.

D. Kelly Agnew, M.D., examined Mr. Polinski on March 29, 2023, for an independent medical evaluation ("IME"). Dr. Agnew's impression was minimal glenohumeral and acromioclavicular degenerative change accompanied by modest rotator cuff tendinopathy, which he noted was a preexisting and incidental finding; worksite injury of the right shoulder on August 30, 2022, most consistent with shoulder strain, with no evidence of structural damage on MRI, CT arthrogram, or plain films; and ongoing complaints with a significant component of nonorganicity. Dr. Agnew opined that Mr. Polinski had reached maximum medical improvement ("MMI") and stated that the proposed arthroscopy surgery was not reasonable or necessary treatment for the compensable injury.

On April 5, 2023, the claim administrator denied authorization for right shoulder arthroscopy, subacromial decompression, and evaluation and treatment of humeral head

cyst with possible bone graft based on the IME report of Dr. Agnew. Mr. Polinski protested this order to the Board.

On April 18, 2023, Mr. Polinski presented to Jeffrey Abbott, D.O., with right shoulder pain. Dr. Abbott reviewed a previous MRI of the right shoulder, which showed mild degenerative joint disease (“DJD”) and a partial rotator cuff tear involving the supraspinatus. He assessed traumatic incomplete tear of right rotator cuff, subacromial impingement of the right shoulder, and biceps tendonitis on the right.

Mr. Polinski was seen by Patrick T. McCulloch, M.D., on April 24, 2023, regarding his right shoulder injury. Dr. McCulloch assessed right shoulder pain with partial-thickness rotator cuff tear and noted that Mr. Polinski did not have pain or problems with his right shoulder prior to the compensable injury. He recommended right shoulder arthroscopy with debridement and a rotator cuff repair.

On May 24, 2023, Mr. Polinski underwent right shoulder arthroscopy with labral debridement, synovectomy and chondroplasty, and open right rotator cuff repair with subacromial decompression performed by Dr. Abbott. The pre-operative diagnosis was traumatic partial right rotator cuff tear and subacromial impingement of the right shoulder. The post-operative diagnosis was traumatic full-thickness right rotator cuff tear, degenerative anterior labral tear, synovitis right shoulder, subacromial impingement right shoulder, and DJD grade 3 involving the glenoid.

Mr. Polinski was deposed on May 31, 2023, and testified that he had been employed as an electrician at Consol for ten years. Further, Mr. Polinski indicated that after the compensable injury he went home and did not complete his shift. Mr. Polinski indicated that he went back to work the following day and performed light duty work. Mr. Polinski testified that he was then placed on his regular longwall job, which he could not perform because of the injury. Mr. Polinski stated that prior to August 30, 2022, he had no problems, treatment, complaints, or injuries regarding his right shoulder. He indicated that he worked from August 31, 2022, until October 2, 2022, when he was taken off work.

On July 3, 2023, Dr. Agnew authored a supplemental report in which he opined that Mr. Polinski had recovered from the compensable shoulder strain. Further, he opined that the MRI and intraoperative findings of the right rotator cuff did not correlate to the mechanism of the compensable injury. Dr. Agnew indicated that if a traumatic rotator cuff disruption occurred on the date of the compensable injury, Mr. Polinski would have had immediate and significant dysfunction of the right shoulder. Dr. Agnew related the operative findings of the right shoulder to degenerative and age-related change.

On July 26, 2023, Dr. Agnew was deposed and testified that he reviewed Mr. Polinski’s treatment records and physical therapy notes, as well as his MRI and CT scan. Dr. Agnew stated that Mr. Polinski’s ten-day delay in obtaining treatment for the right

shoulder and his ability to continue working speaks against a traumatic disruption of the rotator cuff tendons. Dr. Agnew testified that he was provided a video that was posted to Mr. Polinski's Facebook page on April 19, 2023, which depicted him with an arm raised overhead, demonstrating greater motion than he was willing to demonstrate during the IME. Dr. Agnew indicated that the injury of August 30, 2022, was consistent with a shoulder strain, and that the operative report confirmed an age-related process and a degenerative tear.

On July 27, 2023, Mr. Polinski completed a signed affidavit regarding his claim. Mr. Polinski stated that before Dr. Agnew's deposition, counsel for the employer emailed a video clip from his Facebook page, which Dr. Agnew testified proved that his range of motion was better than he demonstrated in his office for the IME. However, Mr. Polinski stated that this clip was filmed approximately a year and a half before the August 30, 2022, injury.

On September 5, 2023, Mr. Polinski completed an additional affidavit regarding his claim. Mr. Polinski stated that on August 30, 2022, he was injured while at work when a mantrip he was riding in collided head-on with another mantrip. Mr. Polinski also stated that he was asked to complete an incident report following the collision, and that he did so. Mr. Polinski indicated that Consol had produced an Incident Report dated August 30, 2022, which contained his signature, but that this was not the original incident report that he signed. Mr. Polinski noted that although the Incident Report produced by Consol states that he continued to work and finish his shift on the date of the injury, this is not correct, and he instead went home after the accident. Mr. Polinski also stated that while this report indicated that he suffered a neck and shoulder strain, he had not yet seen a doctor and did not have a diagnosis.

On January 3, 2024, Dr. Abbott submitted a Diagnosis Update which requested that traumatic incomplete tear of the right rotator cuff, subacromial impingement of the right shoulder, and right biceps tendonitis be added as compensable conditions in the claim. On January 9, 2024, Dr. Myers requested that tendinopathy of the right shoulder, humerus bone cyst, and tendon/bursa disorder be added as compensable conditions in the claim.

On February 7, 2024, the claim administrator issued an order which denied Dr. Abbott's request to add traumatic incomplete tear of the right rotator cuff, subacromial impingement of the right shoulder, and right biceps tendonitis as compensable conditions in the claim. The claim administrator indicated that the evidence does not support the compensability of these conditions, Dr. Agnew opined that the compensable injury is limited to a strain/sprain of the right shoulder, and that the request is barred by the doctrine of res judicata and/or collateral estoppel. Further, the claim administrator noted that no supporting medical records were submitted with the Diagnosis Update request. Mr. Polinski protested this order to the Board.

On August 7, 2024, the Board issued an order which modified the claim administrator's February 7, 2024, order, and added tear of the right rotator cuff as a compensable condition in the claim. The Board affirmed the remainder of the claim administrator's order. It is from this order that Consol 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*, 250 W. Va. 510, 905 S.E.2d 528 (2024).

On appeal, Consol argues that this matter should be barred based on the doctrine of res judicata, because there was a final adjudication on the merits by the Board in the previous protest, the parties are identical to the previous matter, and the cause of action is identical to the previous protest.² Consol also argues that the Board erred in determining that Consol did not rebut the presumption in *Moore v. ICG Tygart Valley, LLC*, 247 W. Va. 292, 879 S.E.2d 779 (2022). Further, Consol asserts that the most credible evidence in the record is Dr. Agnew's report, and the Board erred in disregarding it. We disagree.

² In *Polinski v. Consol Bailey Mine WV*, No. 24-ICA-11, 2024 WL 3594348 (W. Va. Ct. App. July 30, 2024) (memorandum decision), this Court considered Mr. Polinski's appeal of the Board's December 12, 2023, order which denied authorization for a right shoulder arthroscopy, subacromial decompression, and evaluation of humeral head cyst with possible bone graft, as well as closed the claim for temporary total disability benefits. This Court affirmed the Board's order.

Upon review, we find that Consol’s arguments regarding res judicata do not apply.³ Because the compensability of the right rotator cuff tear was not previously before the Board, there were no holdings on the merits as it pertained to this diagnosis.⁴ Further, the condition of right rotator cuff tear had not been added as a compensable component of the claim at the time the prior treatment issue was litigated. *See Globe Specialty Metals v. Vernon Carpenter*, No. 23-ICA-380, 2023 WL 8680671 (W. Va. Ct. App. Dec. 15, 2023) (memorandum decision) (finding that res judicata or collateral estoppel did not apply because meniscus tear had not been added to the claim at the time the prior reopening applications were litigated, so there were no holdings on the merits as it pertained to TTD benefits attributable to that diagnosis.) It is not an infrequent occurrence in workers’ compensation claims that the proverbial “cart is put before the horse.” In other words, a doctor requests treatment before he or she realizes that a condition must be added to the claim before treatment may be authorized. Consol’s argument that the issue of compensability could have been litigated earlier is misplaced, because until the claim administrator has addressed compensability, the issue cannot be litigated. Accordingly, this doctrine is not implicated here.

In *Moore*, the Supreme Court of Appeals of West Virginia held that “[t]here 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.” *Moore*, 247 W. Va. 292, 879 S.E.2d 779, syl. pt. 5. Here, the Board concluded that Consol did not rebut the *Moore* presumption. The Board noted that there is no medical evidence suggesting that Mr. Polinski had symptoms in his right shoulder prior to the work injury. Following the compensable injury, NP Dobson, Dr.

³ As the Supreme Court of Appeals of West Virginia has explained,

[c]ollateral estoppel pertains to “issue” preclusion and requires that an identical issue have been “actually litigated” among the parties or their privies in other litigation. Res judicata pertains more broadly to “claim” preclusion and bars relitigation of claims that were either actually litigated or could have been litigated in other proceedings.

Chalifoux v. W. Va. Dep’t of Health and Human Res., 250 W. Va. 617, 628, 906 S.E.2d 270, 281 (2023).

⁴ In *Polinski*, 2024 WL 3594348, at *3, this Court disagreed with Mr. Polinski, who argued that compensability of the rotator cuff injury was properly before the Board. This Court found that the issue of the compensability of the right rotator cuff injury was not properly before the Board in that appeal. Instead, the issue in the prior litigation was the denial of surgical treatment for the right rotator cuff, which was ultimately affirmed because compensability had not previously been addressed.

McCulloch, Dr. Myers, and Dr. Abbott all diagnosed a tear of the right rotator cuff. Further, the right shoulder arthroscopy performed by Dr. Abbott on May 24, 2023, confirmed the right rotator cuff tear. Based on the foregoing, the Board found that the tear of the right rotator cuff is causally related to the compensable injury and should be added as a compensable condition in the claim.

Although Consol argues that the Board erred in failing to consider that Dr. Agnew's report was the most credible in the record, the Board found that there are no medical records prior to the compensable injury nor any other indication that Mr. Polinski had symptoms in his right shoulder prior to the compensable injury which would support Dr. Agnew's conclusion that the right rotator cuff tear was degenerative in nature. We defer to the Board's determinations of credibility. *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.").

Moreover, as set forth by the Supreme Court of Appeals of West Virginia, "[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 modifying the claim administrator's order and adding right rotator cuff tear as a compensable condition in the claim.

Finding no error, we affirm the Board's August 7, 2024, order.

Affirmed.

ISSUED: June 6, 2025

CONCURRED IN BY:

Chief Judge Charles O. Lorensen
Judge Daniel W. Greear
Judge S. Ryan White