

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 24 - _____

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BILLY JOHNSON

PETITIONER,

V.

BLACKHAWK MINING

RESPONDENT,

BRIEF IN SUPPORT OF APPEAL

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ASSIGNMENTS OF ERROR

The Intermediate Court of Appeals (ICA) and Board of Review (BOR) erred in finding that the Claimant had not met his burden of proof to show reopening for a period of Temporary Total Disability (TTD) and adding cervical strain to the compensable injuries, where the Claimant had submitted an appropriate Insurance Commissioner form completed by a medical provider and the Employer's examining physician, Dr. Mukkamala, attributed 4% of his total 8% permanent partial disability to the current injury and the Employers' Report of Occupational Injury stated, "There was no reason to question the injury."¹ The Employer denied TTD initially on the grounds that the Claimant had returned to work, despite knowing that the Claimant had not returned to work.² The ICA consolidated this appeal and an appeal of the initial denial of TTD in one order.

The Board of Review committed error in failing to weigh the evidence as required by statute and make findings of fact to support its conclusions. West Virginia Code, §23-4-1g.

Weighing of evidence.

STATEMENT OF THE CASE

This is the appeal of a decision of the ICA and BOR which affirmed an Order of the Third-Party Administrator which denied reopening for cervical strain. The Claimant had not been

¹ "12. The Employer submitted the Employers' Report of Occupational Injury or Disease dated June 30, 2022. The date of injury was noted to be June 28, 2022. The Employer noted it had no reason to question the injury. It was reported that the Claimant returned to work on June 28, 2022, and that June 28, 2022, was his last day of work." BOR Order Page 3, Appendix 000292 - 000301. The statement that the Claimant returned to work was wrong.

²§ 23-4-16(b) In any claim in which an injured employee makes application for a further period of temporary total disability, if the application is in writing and filed within the applicable time limit stated above, the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, shall pass upon the request within thirty days of the receipt of the request. If the decision is to grant the request, the order shall provide for the receipt of temporary total disability benefits. In any case in which an injured employee makes application for a further award of permanent partial disability benefits or for an award of permanent total disability benefits, if the application is in writing and filed within the applicable time limit as stated above, the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, shall pass upon the request within thirty days of its receipt and, if the commission determines that the claimant may be entitled to an award, the commission, successor to the commission, other private carrier or self-insured employer, whichever is applicable, shall refer the claimant for further examinations that are necessary.

awarded any Temporary Total Disability. The Claimant was injured when the brakes on a rock truck he was operating failed, and he rolled over a berm. The Claimant was awarded 4% permanent partial disability, allocated from a total of 8% permanent partial disability based on the report of Dr. Mukkamala. The original compensability order stated that the Claimant returned to work. The Claimant did not in fact return to work. Deposition page 7, Appendix 000203 – 000240, 000211.³

STATEMENT OF FACTS

This is pending on the Claimant’s protest to the order of the Employer which stated,

The claimant has not established an aggravation or progression of the compensable injury or facts not previously considered which would entitle the claimant to additional TTD benefits. Order, page 8 Appendix 000292 – 000301.

The Claimant testified that he was injured when a rock truck he was operating backed over a strip mine berm. Transcript page 5-6, Appendix 000015. *See also*, Appendix 000115. The report of injury states that the Claimant “suffered an occupational injury and did not aggravate a prior injury/disease.” Employer submission January 12, 2023. Appendix 000163.

The Claimant testified that he was treated by CAMC General. Transcript page 6 and 7, Appendix 000203 – 000240, and Claimant’s interrogatory answers to Employer, submitted January 5, 2023. Appendix 000115. By evidentiary submission dated January 5, 2023, the Claimant submitted a copy of the attending physician’s report which documented that Claimant was temporarily totally disabled from “6/28 to present.” The form was faxed to Elise Chalk at the

³ Q Have you returned to work?

18 A I have not.

19 Q Since the incident?

20 A I haven’t received a dime since June 28th.

21 Q That is what I was getting at. You have

22 not worked anywhere after June 28, 2022; is that right?

23 A I have not, no, sir.

Transcript page 7, Appendix 000211.

Third-Party Administrator. Appendix 000169. The records show that the Claimant had an MRI at Women and Children's Hospital. Claimant's submission. Appendix 000104 – 000106. The Claimant explained that he had an MRI there because he could not fit in the machine in Logan. Transcript page 10. Appendix 000214. In the interrogatories the Claimant stated that he injured his Neck C1 and C3 and Back L5 and S1. Appendix 000116, 000114 - 000119.

The Claimant testified that over the years he had been treated for back issues but had never missed time from work. Transcript page 11-12. Appendix 000215 – 000216. The Claimant testified that the pain he suffered after June 28, 2022, was different. He had pain in his legs, feet, and his back pain was worse. Transcript page 13 Appendix 000217. Claimant's submission February 22, 2023. Appendix 000203 – 000240. The Claimant testified that his understanding was that his neck injury was new:

A What it was, I was awarded my Comp. Then
9 they said it was an old injury. That is the reason they
10 didn't give it to me .
11 I said, but C-1 and C- 3 is new, and S-1 is
12 new, but L-5 is old . Yes, L-5 is , but it got worse , and my
13 disk in my L-S is deteriorated now . Transcript page 31, Appendix 000235

He then testified,

Q What you were saying about your neck was
5 from before the accident, as compared to after the
6 accident?
7 A After I had the accident , I have sharp
8 pains going down my neck and down my arms and stuff and
9 middle of my back . Before then , I didn't have no problems .
10 Q Whatever problems you had weren't keeping
11 you from working; right?
12 A Right.

Transcript page 34, Appendix 000238.

The record dated June 29, 2022, includes statements that the Claimant felt a “pop” in his back following the accident and trouble with bowels, numbness, and tingling in BLE. Smith, page

1, Submission February 24, 2023, Appendix 000195. The neurological examination showed motor disturbances and sensory disturbances. Appendix 000194 – 000197.

Records submitted by the Employer for the treatment on June 20, 2022, clearly state, “Daily Assessment: showing improvement as indicated in today's subjective. - Current Status: Improving because he is reporting less discomfort and is showing improved function.” Page 1, Hill Chiropractic Center, Employer’s Submission January 18, 2023. Appendix 000075 – 000078.

The records show that on June 20, 2022, prior to the injury at issue, the Claimant was improving and of course able to work. The records from the emergency room treatment, June 28, 2022 show that his condition was significantly worse. Appendix 000135-139, 000294.

On August 29, 2022, the record reflects the following:

The Chief Complaint is: Patient in the office today for follow up on workers comp injury. He had his MRI on Friday ... BK Summers, Comp Clerk.

HISTORY OF PRESENT ILLNESS

Billy Johnson is a 47 year old male.

Flu on Worker's Compo Pt c/o pain in mid back and lower back radiating into neck and lower extremities. Still having pain.

Pain scale 6 on scale of 10.

Pt states was driving rock truck at work on 6/28/22 when ground gave away and rock truck fell approx 40 feet.

Still having bowel irregularity. Intermittent constipation.

• Musculoskeletal symptoms.

unable to tolerate tramadol--causing irritability and constipation.

Claimant submission February 24, 2023. Appendix 000096.

On October 24, 2022, the Claimant was evaluated for workers compensation purposes, and the record shows,

The Chief Complaint is: COMP VISIT ... SS RMA The Chief Complaint is:

Patient in the office today for follow up on workers comp injury. Still having pain. **Also with numbness to bilateral hands** ... BK Summers, Comp Clerk.

HISTORY OF PRESENT ILLNESS

Billy Johnson is a 47 year old male.

Flu on Worker's Compo Pt c/o **pain in mid back and lower back radiating into neck and lower extremities.** Still having pain.

Pain scale 8 on scale of 10.
• Musculoskeletal symptoms.

Claimant submission February 24, 2023. Appendix 000100.

The evidence submitted by the Employer is that the Claimant reached the maximum degree of improvement on the date of Dr. Mukkamala's exam on July 31, 2023. Appendix 000033. There are multiple references in the record to complaints of cervical/neck pain after the injury:

Hill Chiropractic Center note dated 7/8/ 2022, Mukkamala Report page 14, 000046;
Hill Chiropractic Center note dated 7/11/2022, Mukkamala Report page 15; 000047;
Hill Chiropractic Center note dated 7/13/2022, Mukkamala Report page 16; 000048;
Hill Chiropractic Center note dated 7/20/2022: Mukkamala Report page 17, 000049;
Hill Chiropractic Center note dated 8/3/2022 : Mukkamala Report page 18, 000050;
Hill Chiropractic Center note dated 8/8/2022; Mukkamala Report page 19, 000051;
Hill Chiropractic Center note dated 8/8/2022; Mukkamala Report page 20, 000052;
Hill Chiropractic Center note dated 9/1/2022, Mukkamala Report page 21, 000053;

The record here clearly shows that the Claimant suffered additional pain and symptoms not of record prior to the June 28, 2022 injury, including severe pain, pain extending into both lower extremities, and other complaints.

The Claimant submitted both to the Third-Party Administrator and the BOR the report of temporary total disability. The Claimant submitted the Attending Physician Benefits Form completed by PA-C Cook dated November 4, 2022. It was reported that the Claimant had not returned to work and continued to be off since the injury. PA-C Cook opined that the Claimant was not at maximum medical improvement (MMI) but was ready for a permanent partial

disability (PPD) rating. PA-C Cook opined that the estimated period of disability was from June 28, 2022, to the present. Appendix 000168 – 000169.

The Employer submitted the report of Dr. Mukkamala dated July 31, 2023. Dr. Mukkamala concluded:

...

2. Has the claimant reached maximum medical improvement with regard to the compensable condition(s) related to this claim?

I conclude that the claimant has reached maximum degree of medical improvement from the compensable injury dated 6/28/2022.

3. What, if any, permanent impairment is the claimant presently suffering from exclusively related to the compensable condition(s) in this claim? If the claimant suffers from preexisting or non-compensable impairment, please exclude that impairment from your impairment rating calculation and state with specificity the amount of such pre-existing or noncompensable impairment and the basis for the exclusion of such impairment.

...

The range of motion impairment that was calculated at 11 % does not fall within the accepted ranges for this category. Therefore, the impairment has been adjusted to 8% pursuant to rule 20, section VII, table 85-20-C Please note that the 8% whole person impairment that I calculated is resulting from the pre-existing back pain, the pre-existing noncompensable degenerative spondyloarthropathy **as well as the compensable incident of 6/28/2022.**

Please note that this claimant has had back pain with several visits to the medical personnel starting in 2014. Please also note that even on the day before this particular injury of 6/28/2022 meaning 6/27/2022 he presented to Leah Smith, the nurse practitioner with complaints of back pain. They referred the claimant to physical therapy at that time. That was only one day prior to the compensable injury of 6/28/2022.

Therefore, I will apportion impairment and allocate 4% to pre-existing noncompensable back pain with degenerative spondyloarthropathy and 4% to the compensable injury of 6/28/2022.

Therefore, all in all I conclude that the claimant has 4% whole person impairment resulting from the compensable injury dated 6/28/2022 with the claim number 2077524.

The conclusions were expressed with a reasonable degree of medical certainty. Appendix 000073

The Claimant also claims that he suffered a progression of his injury for cervical strain and that the Employer should have paid the medical treatment.

The BOR found as follows:

27. The claimant submitted a Closing Argument dated October 5, 2023. The claimant argued that he had suffered the additional new injury of cervical strain as a result of the compensable injury and that he should be granted TTD benefits from June 28, 2022, through March 13, 2023, and such subsequent dates as may be documented. The claimant argued that the billing request was for a workers' compensation follow-up and should be paid.

28. The employer submitted a Closing Argument dated October 6, 2023. The employer argued that the claimant was not entitled to TTD benefits because he returned to work the day after the compensable injury, that he could return to work on the day of the injury per the physician's section of the Employees' Report of Occupational Injury or Disease and had no loss wages because he was terminated from employment with cause. The employer argued that the claimant failed to submit evidence that he suffered an aggravation or progression of the compensable injury.

29. The employer submitted another Closing Argument dated October 6, 2023. The employer argued that the claimant failed to submit either the medical record for a date of service of May 17, 2023, or the bill for that service. The employer argued that the claimant has not submitted any evidence supporting his protest.

Appendix 000292 - 000301.

STANDARD OF REVIEW

The 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.

On appeal of a decision of the West Virginia Workers' Compensation Board of Review from the Intermediate Court of Appeals of West Virginia to the Supreme Court of Appeals of West Virginia, the Supreme Court of Appeals is bound by the statutory standards contained in West Virginia Code § 23-5-12a(b) (eff. Jan. 13, 2022). Questions of law are reviewed de novo, while findings of fact made by the Board of Review are accorded deference unless the reviewing court believes the findings to be clearly wrong. *Duff v. Kanawha County Commission*, No. 23-43 (W Va: Supreme Court of Appeals 2024)

SUMMARY OF ARGUMENT

The Claimant, as set forth below in more detail, argues that the ICA and BOR erred in failing to reopen the claim for treatment of the cervical strain. The Claimant submitted medical evidence establishing that this cervical strain was incurred in his workplace injury.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument will significantly aid the decisional process with regard to the application of the law to the facts and standards of appeal at issue.

ARGUMENT

THE ICA AND BOARD OF REVIEW ERRED IN FINDING THAT THE CLAIMANT HAD NOT MET HIS BURDEN OF PROOF TO SHOW THAT CERVICAL STRAIN SHOULD BE ADDED TO THE COMPENSABLE CONDITIONS

The statute requires that claimants be paid temporary total disability for a further period of time. The BOR order cites the case of *Harper v. State Workmen's Compensation Commissioner*, 160 W.Va. 364, 234 S.E.2d 779 (1977). *Harper* held that a reopening for additional Permanent atrial Disability required, "For purposes of obtaining a reopening..., the claimant must show a

prima facie cause, which means nothing more than any evidence which would tend to justify, but not to compel the inference that there has been a progression or aggravation of the former injury.” That claimant sought to increase his prior permanent partial disability award. This is distinguished from the case here, where the Employer denied temporary total disability benefits because the employee was working. This decision was incorrect. The Employer did not obtain medical evidence that the Claimant was at maximum degree of improvement until the examination performed by Dr. Mukkamala. Appendix 000024 – 000074.

The record includes multiple references to cervical strain and neck pain, as set forth above. The Claimant testified about cervical strain, he referenced cervical strain in his interrogatories, and the medical records included references to cervical strain.

W Va. Code, § 23-4-7 states that the legislative policy is "to provide benefits to an injured claimant promptly" and in W. Va. Code, § 23-4-7a, the legislative policy is expressed:

"injured claimants should receive the type of treatment needed as promptly as possible."

W. Va. Code, §23-5-13 states:

"It is the policy of this chapter that the rights of claimants for workers' compensation be determined as speedily and expeditiously as possible to the end that those incapacitated by injuries and the dependents of deceased workers may receive benefits as quickly as possible in view of the severe economic hardships which immediately befall the families of injured or deceased workers... It is also the policy of this chapter to prohibit the denial of just claims of injured or deceased workers or their dependents on technicalities."

In the case of *Gill v. City of Charleston*, 783 SE 2d 857 the Court held in syllabus point 3:

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 discreet new injury, that new injury may be found

compensable.

The Claimant here testified that he suffered new injuries sufficient to establish a new claim for cervical strain in addition to back strain.

The record below shows ample evidence to support adding cervical strain to the list of compensable conditions. The BOR applied the rule regarding reopening for adding impairments or seeking additional permanent partial disability, rather than properly apply the standard for temporary total disability, which is the period of time until they reached maximum degree of medical improvement or returned to work. The Board did not make the appropriate findings to support its decision.

THE BOARD OF REVIEW COMMITTED ERROR IN FAILING TO WEIGH
THE EVIDENCE AS REQUIRED BY STATUTE AND MAKE FINDINGS OF FACT TO
SUPPORT ITS CONCLUSIONS

West Virginia Code, §23-4-1g. Weighing of evidence, provides:

- (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.

The BOR here confined its analysis to conclusory statements which did not reflect the weighing of the evidence as required by the statute. There was no assessment of the relevance,

credibility, materiality, and reliability of the evidence in the context of whether the Claimant should be disqualified. Likewise, there is no legal analysis of the very issue whether a Claimant can be disqualified for “cause” under the circumstances where there is no evidence of intoxication or deliberate intent to cause his own injury. The evidence indeed is that the conditions were less than favorable, the vehicle had a history of brake trouble, the dozer spotter was not on the job, and the Employer’s own examiner found the Claimant suffered a compensable injury.

The lack of analysis required by the statute deprives the Claimant of the ability to effectively appeal this adverse decision and hampers this Court from reviewing the decision in a meaningful way. The finding at a minimum should have been that evidence was at best of equal weight. Therefore, the resolution most consistent with the position should have been adopted. The BOR erred as a matter of law in failing to find that the claim should be reopened to include cervical strain.

CONCLUSION

The Board of Review shall reverse, vacate, or modify the order or decision of the administrative law judge if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative law judge’s findings are:

- (1) In violation of statutory provisions; or
 - (2) In excess of the statutory authority or jurisdiction of the administrative law judge; or
 - (3) Made upon unlawful procedures; or
 - (4) Affected by other error of law; or
 - (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. V. Code §23-5-12(b)

In this case, the BOR violated statutory provisions by:

Not making appropriate findings and properly weighing the evidence as required by West Virginia Code, §23-4-1g. Weighing of evidence;

The ICA and BOR were clearly wrong in view of the reliable, probative, and substantial evidence on the whole record, including but not limited to the testimony of the Claimant, the medical evidence, the findings of its own examining doctor, Dr. Mukkamala, and the record, as a whole, that cervical strain/neck pain should be a compensable condition.

The decision of the ICA and BOR should be reversed and the additional injuries added as compensable as well as such further relief as the Court may deem appropriate.

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