

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 7, 2015

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**PARKERSBURG BEDDING, LLC,
Employer Below, Petitioner**

vs.) **No. 15-0050** (BOR Appeal Nos. 2049603, 2049604 & 2049605)
(Claim No. 2013007082)

**JUDY LOCKHART,
Claimant Below, Respondent**

MEMORANDUM DECISION

Petitioner Parkersburg Bedding, LLC, by Steven K. Wellman, its attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Judy Lockhart, by George Zivkovich, her attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated December 23, 2014, in which the Board affirmed July 11, 2014; July 10, 2014; and July 9, 2014, Orders of the Workers' Compensation Office of Judges. In its July 11, 2014, Order, the Office of Judges reversed the claims administrator's April 10, 2013, decision, which closed the claim for temporary total disability benefits. The Office of Judges granted Ms. Lockhart benefits from the date the claims administrator closed the claim up to October 7, 2013. In its July 10, 2014, Order, the Office of Judges reversed two July 17, 2013, claims administrator decisions as well as a May 3, 2013, decision which respectively denied authorization for a referral to the orthopedic surgeon, John Henry, M.D., surgery, and postoperative therapy. The Office of Judges granted Ms. Lockhart authorization for the requested medical treatment. In its July 9, 2014, Order, the Office of Judges reversed the claims administrator's December 27, 2013, decision denying the addition of right shoulder subacromial bursitis as a compensable condition of the claim. The Office of Judges added the diagnosis to the claim. However, the Office of Judges affirmed the claims administrator's April 10, 2013, decision denying the request to add tear of the supraspinatus tendon as a compensable condition of the claim.¹ The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

¹ The petitioner, Parkersburg Bedding, LLC, has not appealed the Office of Judges' affirmation of the claims administrator's April 10, 2013, denial of the addition of right shoulder tear of the supraspinatus tendon as a compensable condition.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Ms. Lockhart worked in the mattress factory for Parkersburg Bedding, LLC. On September 13, 2012, she tripped over a piece of equipment on the floor and fell landing on her right shoulder and left knee. She was taken to Camden-Clark Memorial Hospital where x-rays showed degeneration in her right shoulder with no fracture or displacement. An x-ray was also taken of her left knee which showed mild to moderate degenerative changes but no acute injury to her bone. Ms. Lockhart was then treated by her family physician, Thomas Herrmann, M.D., who diagnosed her with a contusion of the left knee and a sprain of the right shoulder. He noted that her right shoulder had normal range of motion except that it was tender at the extreme range of motion. Following his assessment, the claims administrator held the claim compensable for a sprain of the right shoulder and a contusion of the left knee. A month later, Dr. Herrmann treated Ms. Lockhart again and noted that, even though her left knee symptoms were improving, she was still experiencing some discomfort in her right shoulder.

On January 2, 2013, Ms. Lockhart was again treated by Dr. Herrmann. She complained that her right shoulder pain had intensified while at home when she put away tubs of her Christmas decorations. Sushil Sethi, M.D., however, evaluated Ms. Lockhart and found that she had reached her maximum degree of medical improvement. He noted that her right shoulder did not seem to bother her at the time of his examination. Dr. Sethi suspected that any ongoing right shoulder complaints were related to pre-existing degenerative disease in the acromioclavicular joint. Following Dr. Sethi's evaluation, an MRI was taken of Ms. Lockhart's right shoulder which suggested the possibility of a tear of the supraspinatus tendon. The MRI also revealed degeneration of the acromioclavicular joint. Dr. Sethi then issued an addendum to his report stating that he believed Ms. Lockhart had no further need of treatment related to her claim. He believed the degeneration in her shoulder was pre-existing and her need for additional treatment was related to this non-occupational condition. Dr. Sethi also issued a second addendum report a month later in which he repeated these conclusions. Dr. Herrmann, however, examined Ms. Lockhart again and, believing she had a torn rotator cuff, recommended that she be referred to the orthopedic surgeon, Dr. Henry.

Dr. Henry agreed with Dr. Herrmann's assessment of Ms. Lockhart's shoulder. He found that she had signs of right shoulder impingement which he recommended be treated surgically. He also noted that Ms. Lockhart denied having prior right shoulder problems. Following Dr. Henry's examination, Dr. Herrmann requested that tear of the supraspinatus tendon be added as a compensable condition of the claim. On April 10, 2013, the claims administrator denied the addition of this diagnosis to the claim. In a separate decision issued the same day, the claims administrator also closed the claim for temporary total disability benefits. On May 3, 2013, the claims administrator also denied authorization for the requested referral to Dr. Henry. Despite

these decisions, Dr. Henry performed an arthroscopic subacromial decompression on Ms. Lockhart's right shoulder on May 20, 2013. He noted that there was no tear of her supraspinatus tendon. Instead, he determined that her shoulder symptoms were caused by subacromial bursitis.

On July 17, 2013, the claims administrator denied authorization for the surgery. In a separate decision issued on the same day, the claims administrator also denied authorization for postoperative physical therapy of the right shoulder. Ms. Lockhart then testified in a hearing before the Office of Judges. She stated that the surgery had decreased her right shoulder pain. She also denied having any shoulder pain prior to the date of the compensable injury. On October 7, 2013, after an aggressive course of physical therapy, Dr. Henry allowed Ms. Lockhart to return to her full work duties. At this time, Dr. Herrmann's office requested that the diagnosis of subacromial bursitis of the right shoulder be added to the claim.

On December 27, 2013, the claims administrator also denied the request to add subacromial bursitis as a compensable condition of the claim. Christopher Martin, M.D., then evaluated Ms. Lockhart. He found that she still had tenderness of the right bicep and over the acromioclavicular joint of her right shoulder. Although he noted that Ms. Lockhart frequently denied any prior shoulder injury, Dr. Martin found that she had been treated by Naresh K. Nayak, M.D., for right shoulder pain related to acromioclavicular arthritis in 2004. Dr. Martin believed that Ms. Lockhart's subacromial bursitis was related to her pre-existing conditions and not the compensable injury. He also found that she had reached her maximum degree of medical improvement related to the compensable injury and did not need any further treatment.

On July 9, 2014, the Office of Judges affirmed the claims administrator's April 10, 2013, decision denying the addition of tear of the supraspinatus tendon as a compensable condition of the claim. The Office of Judges, however, reversed the claims administrator's December 27, 2013, decision and added subacromial bursitis of the right shoulder as a compensable condition of the claim. On July 10, 2014, the Office of Judges also reversed the May 3, 2013, and both July 17, 2013, claims administrator decisions and authorized the requested referral, surgery, and postoperative physical therapy. On July 11, 2014, the Office of Judges also reversed the claims administrator's April 10, 2013, decision closing the claim for temporary total disability benefits. The Office of Judges granted Ms. Lockhart additional temporary total disability benefits up to October 7, 2013, when Dr. Henry released her to return to work. The Board of Review affirmed all three Orders of the Office of Judges on December 23, 2014, leading Parkersburg Bedding, LLC, to appeal.

In its July 9, 2014, Order, the Office of Judges concluded that a preponderance of the evidence supported adding right shoulder subacromial bursitis as a compensable condition of the claim but did not support the addition of tear of the supraspinatus tendon as a compensable condition of the claim. The Office of Judges based this decision on the postoperative treatment notes of Dr. Henry. The Office of Judges found Ms. Lockhart's bursitis was related to the compensable injury because she had continuous right shoulder problems following the injury. Although the Office of Judges considered the treatment notes from Dr. Nayak showing that Ms. Lockhart suffered from right shoulder problems as far back as 2004, it determined that her

current symptoms were related to the compensable injury because she was asymptomatic following the treatment from Dr. Nayak until she injured her shoulder at work.

In its July 10, 2014, Order, the Office of Judges concluded that the orthopedic referral, surgery, and postoperative physical therapy should be authorized because these medical benefits related to the diagnosis of subacromial bursitis which was added to the claim in its July 9, 2014, Order. The Office of Judges acknowledged that Ms. Lockhart had extensive arthritis throughout her body including in both shoulders, but it found that her current symptoms and need for the requested medical benefits were related to the compensable injury especially considering that the other areas affected by arthritis were asymptomatic. The Office of Judges also noted that Ms. Lockhart's shoulder symptoms did not arise until the date of the compensable injury and have been ongoing since that time. The Office of Judges considered the evaluations of Dr. Sethi and Dr. Martin, but it did not rely on their opinions because it found that Ms. Lockhart's treating physicians believed the requested referral, surgery, and physical therapy were related to her compensable bursitis.

In its July 11, 2014, Order, the Office of Judges concluded that Ms. Lockhart was entitled to additional temporary total disability benefits from the date the claims administrator had ceased paying her benefits until October 7, 2013, when Dr. Henry released her to return to full duty work. The Office of Judges determined that Ms. Lockhart's ongoing disability was related to her compensable subacromial bursitis and the subsequent related shoulder surgery. It found that Ms. Lockhart was entitled to additional temporary total disability benefits up to October 7, 2013, when Dr. Henry released her to return to work, because the disabling diagnosis and surgery were related to the compensable injury. The Board of Review adopted the findings of the Office of Judges and affirmed its July 9, 2013; July 10, 2013; and July 11, 2013, Orders.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. Ms. Lockhart has presented sufficient evidence to demonstrate that her subacromial bursitis is causally related to her compensable injury. The Office of Judges was within its discretion in adding the condition to the claim. The treatment notes of Dr. Herrmann indicate that Ms. Lockhart's right shoulder pain subsided following the injury and that her current complaints did not arise until she aggravated her right shoulder condition while carrying tubs of Christmas decorations at home. However, this aggravation of her right shoulder problems is causally connected to the compensable injury because it was attributable to Ms. Lockhart's "customary activity." *Wilson v. Workers' Comp. Comm'r*, 174 W. Va. 611, 616, 328 S.E.2d 485, 490 (1984). The aggravation was not "an independent intervening cause" and is, therefore, compensable. *Id.* Because the Office of Judges held her claim compensable for subacromial bursitis on July 9, 2014, it also properly authorized Ms. Lockhart's request for a referral to Dr. Henry, surgery, and postoperative physical therapy. The Office of Judges was within its discretion in determining these treatment requests were medically related and reasonably required to treat Ms. Lockhart's compensable injury. The medical records support the Office of Judges' Order and demonstrate that Ms. Lockhart needed the requested treatment for her bursitis. The Office of Judges was also justified in granting Ms. Lockhart temporary total disability benefits up to October 7, 2013, when Dr. Henry released her to return to full work duties. The evidence in the record is sufficient to demonstrate that Ms. Lockhart continued to be disabled following the claims administrator's

April 10, 2013, closure of the claim and that this disability is related to her compensable subacrominal bursitis and corresponding surgery.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: October 7, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum