

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

April 12, 2016

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

**EDWARD L. DELANEY,**  
**Claimant Below, Petitioner**

vs.) **No. 15-0534** (BOR Appeal No. 2049884)  
(Claim No. 2013030646)

**WEST VIRGINIA MINE POWER, INC./ ELF GREENBRIER,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Edward L. Delaney, by Linda Garrett, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. West Virginia Mine Power, Inc., by Matthew L. Williams, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 6, 2015, in which the Board modified and affirmed a September 19, 2014, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's June 7, 2013, decision rejecting the claim and held it compensable for a lumbar sprain, a cervical sprain, and displaced C5-6 disc without myelopathy. The Board of Review modified the Office of Judges' holding that displaced C5-6 disc without myelopathy was compensable and excluded the condition from the claim.<sup>1</sup> The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

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.

In October of 2012, prior to beginning his employment for West Virginia Power, Inc., Mr. Delaney received treatment from Denzil Hawkinberry, M.D., for low back and neck pain.

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<sup>1</sup> Mr. Delaney has limited his appeal to the Board of Review's exclusion of displaced C5-6 disc without myelopathy as a compensable condition of the claim and requests that the Office of Judges' Order be reinstated.

Dr. Hawkinberry diagnosed Mr. Delaney with cervical spondylosis, lumbar spondylosis, and displaced cervical intervertebral disc without myelopathy.

Three months later, Mr. Delaney began working as an underground coal miner for West Virginia Power, Inc. He continued to receive treatment from Dr. Hawkinberry and complained that his low back and neck pain had worsened since he began working. Mr. Delaney received physical therapy for his ongoing pain, but his symptoms persisted. Dr. Hawkinberry eventually ordered an MRI of Mr. Delaney's neck. The test, conducted on April 8, 2015, revealed multilevel degenerative disc disease and central canal and neural foraminal encroachment at the C5-6 disc. Based on this MRI, Dr. Hawkinberry repeated his diagnosis of a displaced cervical disc and referred Mr. Delaney to Bill Underwood, M.D., for a neurosurgical evaluation.

On May 11, 2013, Mr. Delaney was riding on the back of a mantrip in an underground mine while working for West Virginia Power, Inc. He turned to look behind him and struck the side of his head on a belt guard. Mr. Delaney was taken to Summersville Memorial Hospital for a traumatic musculoskeletal injury to the neck. A CT scan was taken at the hospital of Mr. Delaney's lumbar spine, head, and cervical spine. It showed chronic changes but no evidence of an acute injury. Nevertheless, Mr. Delaney filed an application for workers' compensation benefits stating that his head, neck, and low back were injured. Mr. Delaney then came under the care of Dr. Underwood, who noted that he had a history of chronic low back and neck pain. Mr. Delaney reported to Dr. Underwood that he felt paralyzed for a few minutes after his work-related injury. He also complained that he was currently experiencing radiating neck pain and weakness in his right arm. Dr. Underwood found that Mr. Delaney's neck pain had greatly increased following the May 11, 2013, injury.

On June 7, 2013, the claims administrator rejected Mr. Delaney's application for workers' compensation benefits because there was no evidence of a new injury or new symptoms. Following this denial, on June 27, 2013, an MRI was taken of Mr. Delaney's cervical spine which revealed multilevel degenerative changes and disc space narrowing, which was most significant at the C5-6 disc. The report noted that the findings were similar to the MRI taken on April 8, 2013. Dr. Underwood then treated Mr. Delaney again. He found that the June 27, 2013, MRI revealed no significant changes when compared with the April 8, 2013, MRI. Despite this finding, Dr. Underwood performed an anterior cervical discectomy and fusion on Mr. Delaney's C5-6 disc.

Francis Johnson then testified by deposition. He stated that he was driving the mantrip at the time Mr. Delaney was injured. He did not see Mr. Delaney hit his head, but he testified that he heard the impact and stopped the vehicle to pull Mr. Delaney off the mantrip and onto the ground. Mr. Johnson testified that he was not driving fast at the time of the injury. Mr. Delaney also testified by deposition. He stated that the impact knocked his hardhat off and he fell off the mantrip. He admitted that he had problems with his cervical spine prior to the May 11, 2013, injury. Robin Groves, the human resources assistant for West Virginia Power, Inc., also testified by deposition. She stated that Mr. Delaney was informed on May 10, 2013, that his pay was decreased due to a job reclassification. Ms. Groves testified that she was present by

speakerphone when Mr. Delaney was informed of this decrease in his pay. She also alleged that Mr. Delaney's injury occurred a half an hour into his shift on the following day.

Six months later, Christopher Martin, M.D., performed an independent medical evaluation of Mr. Delaney. He found that Mr. Delaney had a long history of chronic musculoskeletal pain affecting his neck and low back which pre-dated the injury. Dr. Martin also found that it was unclear if a significant injury occurred on May 11, 2013, despite the deposition testimony of Mr. Delaney and Mr. Johnson. He noted that Mr. Delaney complained of essentially the same symptoms prior to the May 11, 2013, incident. He also found that a comparison of the two MRIs in the record revealed that there was no significant change in Mr. Delaney's condition following the May 11, 2013, incident. On September 19, 2014, the Office of Judges reversed the claims administrator's June 7, 2013, decision and held the claim compensable for a lumbar sprain, a cervical sprain, and displaced C5-6 disc without myelopathy. The Board of Review modified and affirmed the Office of Judges' Order on May 6, 2015, to exclude displaced C5-6 disc without myelopathy as a compensable condition of the claim, which lead Mr. Delaney to appeal.

The Office of Judges concluded that Mr. Delaney suffered a compensable injury to his neck and low back on May 11, 2013. It reversed the claims administrator's denial of Mr. Delaney's application for workers' compensation benefits and held the claim compensable for a lumbar sprain, cervical sprain, and displaced C5-6 disc without myelopathy. The Office of Judges based this conclusion on Mr. Delaney's and Mr. Johnson's deposition testimony. It also found that Mr. Delaney's claim was supported by the treatment notes of Dr. Underwood.

The Board of Review adopted the findings of the Office of Judges and affirmed its Order except with respect to the inclusion of displaced C5-6 disc without myelopathy as a compensable condition of the claim. The Board of Review modified the Office of Judges' Order to exclude displaced C5-6 disc without myelopathy as a compensable condition. It concluded that the Office of Judges was clearly wrong insofar as it held the claim compensable for this diagnosis. The Board of Review found that Mr. Delaney's displaced C5-6 disc was not causally related to the compensable injury based on his prior medical history. It specifically noted that Dr. Hawkinberry diagnosed Mr. Delaney with a displaced cervical disc without myelopathy six months before the compensable injury and that he referred him to Dr. Underwood for a neurosurgical consultation. The Board of Review also noted that the MRI evidence in the record indicated that there was no significant change in Mr. Delaney's displaced cervical disc condition following the injury. Finally, the Board of Review also relied on the evaluation of Dr. Martin in determining that the May 11, 2013, injury did not cause the displaced cervical disc.

We agree with the conclusions of the Board of Review. Mr. Delaney has not demonstrated that the displaced C5-6 disc without myelopathy is causally related to the compensable injury he suffered on May 11, 2013. Dr. Hawkinberry diagnosed Mr. Delaney with a displaced cervical disc prior to the date of the compensable injury. His treatment notes demonstrate that the condition was symptomatic prior to the compensable injury, and the MRI taken on April 8, 2013, indicates that the displaced disc was related to his pre-existing degenerative condition. The comparison performed by Dr. Martin of the prior MRI to the one

taken on June 27, 2013, further reveals that Mr. Delaney's displaced cervical disc was not aggravated by the compensable injury. The MRI evidence and the evaluation of Dr. Martin provided sufficient support for the Board of Review's modification of the Office of Judges' Order. The Board of Review's decision is also consistent with this Courts recent holding in *Gill v. City of Charleston*, No. 14-0983, at \*11 (Feb. 10, 2016) (reversing the Office of Judges' Order which added pre-existing conditions to the claim, in part, based on medical evidence that the claimant's symptoms did not change after the date of the injury).

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: April 12, 2016**

**CONCURRED IN BY:**

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