

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

KIMBERLY BACKUS,
Claimant Below, Petitioner

vs.) **No. 17-0373** (BOR Appeal No. 2051627)
(Claim No. 2015024644)

STARBUCKS CORPORATION,
Employer Below, Respondent

FILED
November 22, 2017
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Kimberly Backus, by Gregory S. Prudich, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Starbucks Corporation, by James S. Maloney, its attorney, filed a timely response.

The issue on appeal is the compensability of the claim. The claims administrator rejected the claim on April 13, 2015. By its Order dated October 12, 2016, the Office of Judges affirmed the claims administrator's decision. The Board of Review affirmed the Office of Judges' Order on March 20, 2017. 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.

Kimberly Backus, a shift manager for Starbucks Corporation, alleges that she sustained a low back injury in mid-November to early December of 2014. On November 22, 2014, Ms. Backus presented to Princeton Community Hospital and was treated for backache, sacroiliac sprain, cumulative trauma from repetitive motion, and tenosynovitis of the foot and ankle. The triage assessment notes indicated that Ms. Backus reported her back pain developed after lifting at work a few days prior. The emergency room records also indicated that Ms. Backus reported injuring her lower back a few days prior while at work. Jill Farley, R.N., noted that Ms. Backus attributed her pain to heavy lifting at work. Ms. Backus completed an application for benefits

and indicated that she sustained a work-related injury to her back and right arm. Ms. Backus listed the date of injury as November 12, 2014, but put a question mark after the date. In describing the injury, Ms. Backus stated that it was a result of “always lifting heavy things, metal urns, trash, and milk crates.” The physician’s section of the form indicated that Ms. Backus first sought treatment on November 22, 2014, for an occupational injury resulting in a lumbar sprain.

Ms. Backus continued to work until February of 2015, when her pain worsened to the point where she sought further treatment. On February 25, 2015, Ms. Backus returned to Princeton Community Hospital with complaints of worsening low back pain with pain extending into the right leg. She described her mechanism of injury as heavy lifting. A CT scan of the lumbar spine was performed and revealed spondylosis and sclerosis at L1-2. The findings were suggestive of a mild bulging disc at L5-S1. Mild sclerosis with minimal narrowing of the right sacroiliac joint, possibly secondary to mild degenerative changes, was noted. The impression was back pain.

On March 11, 2015, Ms. Backus began treating with Florencio Neri, M.D. Dr. Neri’s assessment was shoulder pain and low back pain. On March 16, 2015, Dr. Neri authored an attending physician’s statement indicating that Ms. Backus’s condition was the result of an injury. However, Dr. Neri failed to respond to a question on the form asking whether the injury was work-related. The following day, Dr. Neri responded to the claims administrator’s request for additional medical information and stated that Ms. Backus’s condition was not the result of an injury. Rather, Dr. Neri stated that Ms. Backus had been having right shoulder and low back problems for the past year and a half.

The claims administrator rejected the claim on April 13, 2015. The Order stated that Ms. Backus originally described an onset of symptoms with no specific accident or injury. As a result, the claims administrator determined that Ms. Backus did not suffer a compensable work-related injury. Ms. Backus continued seeking treatment from Dr. Neri for her low back pain. On April 20, 2015, Dr. Neri examined Ms. Backus and noted that her symptoms of low back and shoulder pain were first diagnosed on February 3, 2015. Dr. Neri stated that they were the result of a work-related injury. Dr. Neri noted that Ms. Backus’s work required her to lift heavy metal coffee urns, milk, water, and trash all day at work.

Ms. Backus testified in a deposition on December 1, 2015, that her low back injury resulted from a specific event rather than from repetitive trauma. Ms. Backus stated that she was standing on her toes attempting to lift a milk crate above her head when she felt pain in her low back. Ms. Backus testified that she continued working until February of 2015, when she was diagnosed with a bulging disc. Ms. Backus stated that she remained off work from February until May of 2015, when she returned to work on a part time basis. Ms. Backus testified that she worked anywhere from twenty to twenty-five hours a week. She estimated that had she not been injured, she would be working twenty-five to thirty-five hours a week. Ms. Backus denied any problems with her low back prior to the work-related incident in November of 2014. She complained of constant, sharp pain in her lower back radiating down to her right leg into the calf muscle.

By Order dated October 12, 2016, the Office of Judges affirmed the claims administrator's decision rejecting the claim. The Office of Judges concluded that the record contained sufficient inconsistencies and discrepancies to conclude that a work-related injury did not occur as alleged by Ms. Backus. For instance, the initial treatment notes from Princeton Community Hospital provide conflicting stories of the mechanism of injury. The attestation statement indicates that Ms. Backus was treated for trauma from repetitive motion while a nurse's note and the emergency room records state that Ms. Backus injured her back while lifting a few days prior. Further, medical records from May 1, 2015, indicate that the cause of Ms. Backus's low back pain was uncertain.

Ms. Backus's treating physician also provided conflicting statements. In an attending physician's statement dated March 16, 2015, Dr. Neri indicated that Ms. Backus's condition was the result of an injury but failed to respond to a question of whether the injury was work-related. The following day, Dr. Neri indicated that Ms. Backus's condition was not the result of an injury at all. Rather, he indicated that she had been suffering from the symptoms for a year and a half. On April 20, 2015, Dr. Neri contradicted his previous statement and indicated that Ms. Backus's low back condition was the result of a work-related injury.

Finally, the Office of Judges noted that Ms. Backus also provided conflicting statements of how the injury occurred. When Ms. Backus originally filed her claim, she indicated that she injured her low back by always lifting heavy things at work. However, in her deposition, Ms. Backus testified that she injured herself in one specific occurrence. Taken as a whole, the Office of Judges concluded that the evidentiary record contained too many inconsistencies and discrepancies to support a finding of compensability in this claim. Some evidence suggested cumulative trauma while other evidence suggested a single occurrence injury. Yet other evidence suggested that Ms. Backus did not sustain an injury at all. The Office of Judges concluded that Ms. Backus failed to prove her claim by a preponderance of the evidence. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on March 20, 2017.

After review, we agree with the findings of fact and conclusions of law of the Office of Judges as affirmed by the Board of Review. The evidentiary record is full of inconsistent statements as to how or whether Ms. Backus was injured in the course of and as a result of her employment. Ms. Backus failed to provide persuasive evidence or argument as to a definitive mechanism of injury and thus did not meet her burden of proof. The Board of Review and Office of Judges did not err in affirming the denial of her claim.

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: November 22, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Elizabeth D. Walker

DISSENTING:

Justice Menis E. Ketchum