

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**MURRAY AMERICAN ENERGY, INC.,  
Employer Below, Petitioner**

**FILED**

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

vs.) **No. 17-0375** (BOR Appeal No. 2051592)  
(Claim No. 2016027512)

**KEVIN SPRY,  
Claimant Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Murray American Energy, Inc., by Aimee M. Stern and Denise D. Pentino, its attorneys, appeals the decision of the West Virginia Workers' Compensation Board of Review. Kevin Spry, by Robert L. Stultz, his attorney, filed a timely response.

The issue on appeal is the compensability of the claim. The claims administrator rejected the claim on May 23, 2016. By its Order dated September 22, 2016, the Office of Judges reversed the claims administrator's decision and held the claim compensable for a left shoulder sprain and a rotator cuff tear. 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.

Kevin Spry, a coal miner, alleges he was injured in the course of and as a result of his employment on April 22, 2016. Mr. Spry reported an incident to his supervisors and indicated that he had injured his left shoulder while carrying a heavy cable. Mr. Spry presented to Corporate Health at Wheeling Hospital on April 28, 2016, reporting that he injured his left shoulder when he was hanging a large cable overhead and experienced a popping sensation in his left shoulder. Mr. Spry denied any previous injuries to his left shoulder. An x-ray of the left shoulder was performed and revealed mild degenerative changes involving the glenohumeral and

acromioclavicular joints. No fracture or dislocation was found. The impression was a left shoulder sprain but a diagnostic MRI was requested to rule out any internal derangement. Mr. Spry completed an application for benefits and the physician's section listed the diagnosis as a left shoulder sprain as a result of an occupational injury.

The claims administrator rejected the claim on May 23, 2016. Regarding the reason for the denial, the Order stated that a medical report, the Employee's and Physician's Report of Occupational Injury, and an incident report contained conflicting information. Mr. Spry subsequently underwent an MRI of the left shoulder on June 2, 2016, which revealed mild atrophy of the supraspinatus muscle; areas of fatty infiltration within the infraspinatus; a complete full-thickness supraspinatus tendon tear; high-grade partial, near complete tear of the infraspinatus; high-grade subscapularis tendon tear; and mild acromioclavicular joint degenerative changes. Earl Braunlich, M.D., performed a surgical repair of Mr. Spry's rotator cuff tear on June 29, 2016.

On August 16, 2016, Mr. Spry testified in a deposition that he injured his left arm when he was pulling cables from a beltline to the track. He noted that it takes four to five people to carry the cables, and on April 22, 2016, he and several co-workers were moving the cables when the man in front of him and the man behind him dropped the cable, causing it to jerk his arm. Mr. Spry's pain persisted after the initial injury and he underwent an MRI which revealed a rotator cuff tear. Mr. Spry testified that he had no problems with his left shoulder prior to April 22, 2016. When asked why he waited six days to seek treatment, Mr. Spry stated that after his shift ended on the day of the injury, he was off for the weekend. When his pain had not improved by his next shift, he informed the human resources department and was scheduled for an appointment with Corporate Health.

Ira Ungar, M.D., performed a record review of the claim on August 27, 2016. Dr. Ungar noted that there was positive testing suggesting rotator cuff pathology. He also noted that Mr. Spry was diagnosed with significant rotator cuff disease involving three of the four musculotendinous units in the rotator cuff. Based upon MRI results revealing fatty infiltration and atrophy in the shoulder, Dr. Ungar suggested that Mr. Spry had two to three years of significant rotator cuff pathology. Dr. Ungar opined that the pathology identified by the MRI and at operative intervention is not the result of the April 22, 2016, injury. He stated that it was simply the time where performing repetitive job duties overhead became intolerable and unsustainable in an individual with advanced rotator cuff disease.

By Order dated September 22, 2016, the Office of Judges reversed the claims administrator's decision rejecting the claim and held the claim compensable for a left shoulder sprain and a rotator cuff tear. The Office of Judges found that the claims administrator's statement that the reports submitted contained inconsistent information was questionable. The claims administrator did not explain what information was inconsistent and the Office of Judges noted that all of the records indicated the same diagnosis. The Office of Judges found that there was not adequate conflicting information to affirm the denial on that basis. Rather, the Office of Judges found that there was sufficient evidence to establish an isolated fortuitous event which occurred at work.

The Office of Judges noted that Mr. Spry was initially diagnosed with a left shoulder sprain as a direct result of an occupational injury. Mr. Spry continued to suffer pain and underwent an MRI which revealed a rotator cuff tear. Mr. Spry testified that he had no left shoulder problems prior to the work-related injury and no evidence to the contrary was submitted. Based on the established diagnosis of a rotator cuff tear with no symptoms prior to April 22, 2016, the Office of Judges determined that Mr. Spry sustained a left shoulder sprain and rotator cuff tear in the course of and resulting from his employment.

In addressing the employer's argument that Mr. Spry's diagnosis was due to pre-existing conditions as noted by Dr. Ungar, the Office of Judges determined that case law has established that the mere existence of a pre-existing condition does not preclude a compensable claim if the injury is a discreet new injury. See *Gill v. City of Charleston*, 236 W.Va. 737, 783 S.E.2d 857 (2016). The case goes on to say that a pre-existing injury does not become compensable if merely aggravated. Rather, it is only a new injury resulting from the aggravation of a pre-existing injury that becomes compensable. 236 W.Va. at 746, 783 S.E.2d at 866. The Office of Judges concluded that Mr. Spry suffered a discreet new injury and therefore, reversed the claims administrator's decision and held the claim compensable for a left shoulder sprain and a rotator cuff tear. 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 reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Mr. Spry immediately reported his injury and was diagnosed with a left shoulder sprain as a result of an occupational injury shortly thereafter. When his symptoms persisted, Mr. Spry underwent an MRI which revealed a rotator cuff tear as well as some degenerative symptomology. Mr. Spry testified that he did not suffer symptoms in his left shoulder prior to the April 22, 2016, injury, and no evidence to the contrary has been submitted. Although Dr. Ungar has opined that Mr. Spry's pathology is related to his degenerative disease, no evidence has shown that symptoms were present prior to the injury sustained on April 22, 2016. In accordance with *Gill v. City of Charleston*, it appears that Mr. Spry has sustained a discreet new injury. The evidence of record is sufficient to support a finding that Mr. Spry sustained a left shoulder sprain and rotator cuff tear in the course of and as a result of his employment.

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 Menis E. Ketchum

Justice Elizabeth D. Walker