

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

September 13, 2019  
EDYTHE NASH GAISER, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**DAVID W. MILLER,**  
**Claimant Below, Petitioner**

vs.) **No. 18-0802** (BOR Appeal No. 2052730)  
(Claim No. 2014026222)

**ROGERS PETROLEUM, INC.,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner David W. Miller, by Reginald D. Henry, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Rogers Petroleum, Inc., by Timothy E. Huffman, its attorney, filed a timely response.

The issue on appeal is additional compensable conditions. The claims administrator denied the addition of lumbar intervertebral disc displacement to the claim on September 28, 2016. On February 24, 2017, it denied the addition of right lumbar radiculopathy to the claim. The Office of Judges affirmed the decisions in its March 9, 2018, Order. The Order was affirmed by the Board of Review on August 17, 2018.

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.

Mr. Miller, a heavy equipment fueler, was injured in the course of his employment on August 23, 2013. Treatment notes from Raleigh General Emergency Hospital that day indicate Mr. Miller reported an injury to his lower back while pulling on a hose. He stated that he had pain in his lower back and down his right leg. He was diagnosed with degenerative disc disease.

Mr. Miller sought treatment from Michael Kominsky, D.C., on August 25, 2013. He reported that he started having severe low back pain after tugging on hoses at work. Mr. Miller

mentioned a December 4, 2012, injury in which he fell off of a grader and injured his lower back. The injury had significantly worsened since that time. Dr. Kominsky noted that Mr. Miller was examined after the 2012 injury but received no treatment. Dr. Kominsky diagnosed lumbar contusion, lumbar sprain/strain, lumbar facet syndrome, L5-S1 sciatic pain, and sacroiliac sprain/strain. Dr. Kominsky found that Mr. Miller was temporarily and totally disabled and that he had sustained an aggravation of his 2012 injury. A lumbar MRI was performed on September 15, 2013, and showed no significant findings.

The Employees' and Physicians' Report of Injury was completed on February 20, 2014, and indicated Mr. Miller was injured while tugging on a hose. He was treated at Raleigh General Hospital that day and was diagnosed with degenerative disc disease. The claim was held compensable for lumbar and sacrum sprain/strain on June 10, 2014.

On February 24, 2014, Mr. Miller was treated by Teresa Ricottilli, PAC. The treatment note indicates Mr. Miller reported lower back pain after a fall in December of 2012. He was diagnosed with chronic lower back pain. On August 11, 2014, Ms. Ricottilli again indicated that Mr. Miller was seen for chronic lower back pain since a December of 2012 fall. He also reported pain into his right leg and that his right leg had repeatedly given way.

Brian Yee, D.O., saw Mr. Miller on August 4, 2015, for lower back and right leg pain. He diagnosed lumbar sprain and lumbar radiculopathy. Dr. Yee noted that the MRI showed no findings to explain his symptoms and recommended an EMG. The EMG was performed on October 13, 2015, and showed evidence of bilateral tarsal tunnel syndrome as well as chronic right L5-S1 radiculopathy. Mr. Miller returned to Dr. Kominsky on October 28, 2015, for lower back pain, right leg pain, and weakness in his right leg. Dr. Kominsky requested a repeat MRI to check for disc bulges.

On November 5, 2015, Mr. Miller was treated by Sara Mooney, M.D., for constant stabbing pain in his lower back and right leg. Dr. Mooney diagnosed lumbar sprain and lumbar radiculopathy at L5. On February 25, 2016, Mr. Miller was seen for follow up after epidural steroid injections. He reported that the injections did not affect his symptoms. He still had constant pain in his lower back that radiated to the right. The diagnoses remained lumbar sprain and lumbar radiculopathy.

Rebecca Thaxton, M.D., performed a record review on April 19, 2016, in which she recommended that physical therapy be denied. She noted that the accepted diagnoses in the claim are lumbar contusion and lumbar sprain/strain. She found that Dr. Kominsky listed diagnoses of lumbar contusion, lumbar sprain/strain, lumbar facet syndrome, L5-S1 sciatic pain, and sacroiliac sprain/strain. An MRI was negative for any significant findings. An EMG showed bilateral tibial neuropathy and was suggestive of chronic L5-S1 radiculopathy. Dr. Thaxton concluded that Mr. Miller had exceeded the treatment guidelines set forth in West Virginia Code of State Rules § 85-20-37.5 (2006) for the treatment of the compensable lower back sprain. She recommended Paul Bachwitt, M.D., comment on the need for further physical therapy in his upcoming evaluation.

On May 16, 2016, Dr. Bachwitt performed an independent medical evaluation. He noted that he had previously examined Mr. Miller for his December of 2012 lower back injury and found 5% impairment. He opined that the August 23, 2013, injury aggravated the prior lower back injury. Dr. Bachwitt further opined that Mr. Miller sustained a simple sprain/strain on August 23, 2013, that should have resolved long ago. He stated that the medical documentation does not support a causal connection between the August 23, 2013, injury and Mr. Miller's current symptoms. Dr. Bachwitt stated that Mr. Miller's current complaints are due to obesity, a lack of physical fitness, and other medical problems. He found that Mr. Miller had reached maximum medical improvement and required no further treatment. Dr. Bachwitt assessed 5% impairment for the lower back. On July 28, 2016, Dr. Kominsky completed a diagnosis update in which he requested that lumbar disc displacement and lumbar radiculopathy be added to the claim. He stated that the diagnoses were based on the EMG study.

In an August 18, 2016, physician review, Dr. Thaxton was asked to determine if lumbar disc herniation and lumbar radiculopathy should be added to the claim. Dr. Thaxton opined that lumbar disc herniation should not be added to the claim. She found that the MRI showed no indication of a disc herniation. She stated that there was a conflict between the MRI, which showed no herniation, and the EMG, which was positive for lumbar radiculopathy. Dr. Thaxton found that Dr. Bachwitt determined Mr. Miller had reached maximum medical improvement for the August 23, 2013, injury. Dr. Thaxton opined that additional medical testing is needed to determine the compensable components of the claim since there is a conflict between the EMG and MRI. She declined to comment on the compensability of the requested conditions until new medical evidence could be obtained.

The claims administrator denied the addition of disc displacement and radiculopathy to the claim on August 24, 2016. The StreetSelect Grievance Board reviewed the case on September 21, 2016, and noted that Mr. Miller's MRI was negative and that he was found to be at maximum medical improvement on May 16, 2016. It further noted that Dr. Thaxton recommended denial of the addition of lumbar disc displacement and lumbar radiculopathy to the claim since the MRI showed no indication of a disc herniation. The Board agreed with Dr. Thaxton. The claims administrator denied a request for the addition of lumbar intervertebral disc displacement to the claim on September 28, 2016.

In an October 20, 2016, independent medical evaluation, Dr. Bachwitt noted that he had previously found that Mr. Miller had 5% impairment for the lower back. He opined that the August 23, 2013, injury aggravated the prior December of 2012 low back injury. Dr. Bachwitt opined that Mr. Miller's symptoms were due to obesity and preexisting lumbar degenerative changes. He noted that an MRI was essentially normal while an EMG showed chronic right L5-S1 radiculopathy. Physical examination showed normal lower extremity motor strength, symmetrical reflexes, and diminished sensation at L3-4 on the right, which Dr. Bachwitt stated was inconsistent with the EMG which showed radiculopathy at L5-S1. He stated that the EMG did not correlate with the MRI or the physical findings. Dr. Bachwitt found that the MRI was a more accurate study. He recommended denying the addition of lumbar radiculopathy to the claim.

An October 31, 2016, treatment note by Dr. Kominsky indicates he felt Mr. Miller's EMG results were consistent with his symptoms. He found a causal relationship between the EMG findings and the August 23, 2013, injury. He diagnosed intervertebral disc displacement in the lumbar region as a result of the compensable injury. He opined that Mr. Miller's condition had progressed and requested a repeat MRI.

Randall Short, D.O., performed a physician review on November 11, 2016, in which he recommended that the addition of lumbar radiculopathy to the claim be denied. He stated that based on the medical records and the most recent examination by Dr. Bachwitt, the condition did not appear to be causally related to the compensable injury.

The claims administrator denied the addition of right lumbar radiculopathy to the claim on January 19, 2017. The StreetSelect Grievance Board convened on February 15, 2017, and determined that lumbar radiculopathy should not be added to the claim. They found the compensable conditions to be lumbar and sacral sprains. An MRI was negative for herniated discs or protrusions. Further, Drs. Short and Bachwitt opined that there is no evidence of radiculopathy based on objective testing. The claims administrator denied a request for the addition of right lumbar radiculopathy to the claim on February 24, 2017.

The Office of Judges affirmed the claims administrator's decisions in its March 9, 2018, Order. It found that the findings of Dr. Thaxton, Dr. Bachwitt, Dr. Short and the StreetSelect Grievance Board were more persuasive than those of Dr. Kominsky. Dr. Kominsky opined that the conditions of intervertebral disc displacement and lumbar radiculopathy were related to the compensable injury. However, Drs. Bachwitt and Short determined that the MRI was essentially normal and showed no indication of a disc herniation. They therefore concluded that the requested conditions were not related to the compensable injury. The Office of Judges concurred. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on August 17, 2018.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. The diagnostic tests of record are in conflict. The MRI showed essentially normal findings while the EMG revealed L5-S1 radiculopathy. In his independent medical evaluation, Dr. Bachwitt found that Mr. Miller's physical examination showed normal lower extremity motor strength, symmetrical reflexes, and diminished sensation at L3-4 on the right, which Dr. Bachwitt stated was inconsistent with the EMG which showed radiculopathy at L5-S1. The Office of Judges, and by extension Board of Review, was correct to find that a preponderance of the evidence indicates lumbar disc displacement and lumbar radiculopathy should not be added to the 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: September 13, 2019**

**CONCURRED IN BY:**

Chief Justice Elizabeth D. Walker

Justice Margaret L. Workman

Justice Tim Armstead

Justice Evan H. Jenkins

Justice John A. Hutchison