IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2023 Term

FILED
November 8, 2023
released at 3:00 p.m.
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 21-0754

ROBERT HOOD,
Petitioner,

v.

LINCARE HOLDINGS, INC.,
Respondent.

Appeal from the Workers' Compensation
Board of Review
Case No. 2056412

AFFIRMED

Submitted: October 31, 2023
Filed: November 8, 2023

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CHIEF JUSTICE WALKER delivered the Opinion of the Court.

JUSTICE HUTCHISON concurs in part, dissents in part, and writes separately.

JUSTICE WOOTON dissents and writes separately.

SYLLABUS BY THE COURT

1. "In order for a claim to be held compensable under the Workmen's Compensation Act, three elements must coexist: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment." Syllabus Point 1, *Barnett v. State Workmen's Comp. Comm'r*, 153 W. Va. 796, 172 S.E.2d 698 (1970).

2. "'In determining whether an injury resulted from a claimant's employment, a causal connection between the injury and employment must be shown to have existed.' Syllabus Point 3, *Emmel v. State Compensation Director*, 150 W. Va. 277, 145 S.E.2d 29 (1965)." Syllabus Point 3, *Casdorph v. W. Va. Off. Ins. Comm'r*, 225 W. Va. 94, 690 S.E.2d 102 (2009).

3. "Whether an injury occurs . . . resulting from the employment so as to be compensable under the workmen's compensation act depends upon the particular facts in each case." Syl. Pt. 2, in part, *Emmel v. State Comp. Dir.*, 150 W. Va. 277, 145 S.E.2d 29 (1965)." Syllabus Point 3, *Morton v. W. Va. Off. of Ins. Comm'r*, 231 W. Va. 719, 749 S.E.2d 612 (2013).

4. In the context of workers' compensation law, there are four types of injury-causing risks commonly faced by an employee at work: (1) risks directly associated with employment; (2) risks personal to the claimant; (3) mixed risks; and (4) neutral risks.

5. The factfinder may use the increased-risk test when deciding whether an employee sustained a compensable injury under West Virginia Code § 23-4-1(a) (2018), in cases where the injury occurred while the employee was engaged in a neutral risk activity. Under the increased-risk test, even if the risk faced by the employee is not qualitatively peculiar to the employment, the injury may be compensable if he faced an increased quantity of a risk.

WALKER, Chief Justice:

While descending a short set of stairs from a customer's porch after making a delivery for his employer, Robert Hood felt a "pop" and pain in his right knee. He was later diagnosed with a right knee sprain. Mr. Hood did not slip, trip, or fall, and he was not carrying anything. The West Virginia Workers' Compensation Board of Review affirmed previous rulings rejecting the claim, and Mr. Hood appeals. Even though Mr. Hood was injured while working, he failed to show that his work caused the injury. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On May 1, 2020, Robert Hood was delivering medical supplies for his employer, Lincare Holdings, Inc. On his third stop of the day, Mr. Hood greeted a customer, who was standing on his porch, gathered five empty oxygen bottles, and took them to the van he was driving. Mr. Hood retrieved five replacement oxygen bottles (that weighed in total about twenty-two pounds) from the van, walked up the stairs of the customer's porch, and set them inside the front door of the home.

As he was leaving the customer's residence and began descending the three wooden steps off the porch, Mr. Hood held the handrail. He placed his left foot on the first step with no issues. But Mr. Hood felt his right knee "pop" with "extreme burning" in his leg when he stepped down on the second step using his right foot. Mr. Hood did not slip,

trip, or fall, and he was not carrying anything. Mr. Hood does not contend that the stairs were defective or slippery.

When Mr. Hood got to his van, he sent a text message his supervisor, Kim Harmon, stating "I think I just blew out my knee. I need to get it checked." She agreed. Mr. Hood made one more delivery that day because the next customer was just around the corner.[1] Mr. Hood then returned the employer's van to the shop and drove himself to Wheeling Hospital.

Mr. Hood completed a Report of Occupational Injury that same day stating that he injured his right knee while walking down steps. The physician's section of the application,[2] completed at the emergency department of Wheeling Hospital, indicated Mr. Hood had an occupational injury of a right knee sprain. The physician section stated that Mr. Hood did not aggravate a prior injury or disease. And at his deposition taken in August 2020, Mr. Hood denied any prior injuries or symptoms involving his knee.

Jeffrey Abbott, D.O., examined Mr. Hood on May 5, 2020, for right knee symptoms. Dr. Abbott diagnosed a tear of the right medial meniscus and recommended an

[1] Mr. Hood delivered oxygen bottles to the next customer but could not carry them up on the porch because his knee was hurting.

[2] The physician's signature is illegible.

MRI. On May 11, 2020, Mr. Hood was treated by Ross Tennant, a nurse practitioner. He also diagnosed a right knee sprain and recommended that Mr. Hood undergo an MRI.

The employer's claim administrator denied Mr. Hood's application for workers' compensation benefits, concluding that Mr. Hood did not sustain an injury in the course of and as a result of his employment. Mr. Hood protested that decision to the West Virginia Workers' Compensation Office of Judges.

In February 2021, an Administrative Law Judge with the Office of Judges affirmed the claim administrator's decision. The ALJ stated that Mr. Hood "developed pain in his right knee while engaging in an ordinary activity of daily life," and that no evidence was presented that his "work activities either caused or contributed to the injury." The ALJ concluded that Mr. Hood failed to show by a preponderance of the evidence that he sustained an injury in the course of and as a result of employment.

Mr. Hood appealed the decision of the Office of Judges. On August 23, 2021, the Board of Review adopted the findings of fact and conclusions of law of the ALJ and affirmed the ruling rejecting the claim. Mr. Hood appeals that order to this Court.

II. STANDARD OF REVIEW

Mr. Hood contends that the Board of Review committed clear error when determining that his knee injury was not a result of his employment. In a workers'

compensation appeal, we give deference to the Board of Review's "findings, reasoning, and conclusions[,]"[8] and apply the criteria set forth in West Virginia Code § 23-5-15 (2021):

> (d) If the decision of the board represents an affirmation of a prior ruling by both the commission and the Office of Judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo re-weighing of the evidentiary record. . . .

This Court applies a de novo standard of review to questions of law arising from appeals of the Board of Review's decisions.[3]

III. ANALYSIS

As this Court has previously recognized, the workers' compensation system is a no-fault system.[4] When an employee is injured in the course of and resulting from his covered employment, it does not matter whether the employer or employee was at fault.

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[3] *Justice v. W. Va. Off. Ins. Comm'r*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

[4] *See Miller v. City Hosp., Inc.*, 197 W. Va. 403, 407, 475 S.E.2d 495, 499 (1996) ("Our workers' compensation system is supposed to benefit injured workers by providing benefits and full compensation through a basic no-fault system . . . and to protect employers from the financial consequences of civil liability to injured employees.") (citations and quotation marks omitted).

"In order for a claim to be held compensable under the Workmen's Compensation Act, three elements must coexist: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment."[5] Applying those elements, we have explained that the "in the course of" prong of the compensability phrase refers to "the time, place, and circumstances of the accident in relation to the employment" and the "resulting from" prong refers to "causal origin" of the injury.[6] While these distinct prongs must be met, "it should never be forgotten that the basic concept of compensation coverage is unitary, not dual, and is best expressed in the term 'work connection.'"[7]

There is no dispute that Mr. Hood's knee injury occurred in the course of his employment when he was delivering medical supplies on May 1, 2020. The issue here is whether it "resulted from" that employment, that is, whether it was "work connected." This Court has held that "[i]n determining whether an injury resulted from a claimant's employment, a causal connection between the injury and employment must be shown to

[5] Syl. Pt. 1, *Barnett v. State Workmen's Comp. Comm'r*, 153 W. Va. 796, 172 S.E.2d 698 (1970); *see* W. Va. Code § 23-4-1(a) (2018).

[6] *Morton v. W. Va. Off. of Ins. Comm'r*, 231 W. Va. 719, 723, 749 S.E.2d 612, 616 (2013).

[7] 1 Arthur Larson, Lex K. Larson, Thomas A. Robinson, *Larson's Workers' Compensation* § 3.01 at 3-4 (Rev. Ed. 2023) (hereafter *Larson's*).

have existed."[8] So, even though an employee need not establish fault, he must establish a connection between his work and his injury. Put differently, although workers' compensation benefits are payable irrespective of fault, they are not payable irrespective of cause. "Whether an injury occurs . . . resulting from the employment so as to be compensable under the workmen's compensation act depends upon the particular facts in each case."[9] And this Court affords great deference to the factfinder.[10]

Mr. Hood argues that the Board of Review erred when affirming the previous rulings rejecting his claim because he was injured while descending the stairs of a customer's porch after making a delivery. Because this activity is a regular and ordinary part of his job, Mr. Hood reasons that he was injured as a result of his employment. Lincare responds that the Board of Review properly affirmed the denial of the claim because Mr. Hood failed to establish that he sustained an injury resulting from his employment—that is, there was a lack of a causal connection between his work and his knee sprain.

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[8] Syl. Pt. 3, *Casdorph v. W. Va. Off. Ins. Comm'r*, 225 W. Va. 94, 690 S.E.2d 102 (2009) (quoting Syl. Pt. 3, *Emmel v. State Comp. Dir.*, 150 W. Va. 277, 145 S.E.2d 29 (1965)).

[9] Syl. Pt. 3, *Morton v. W. Va. Off. of Ins. Comm'r*, 231 W. Va. 719, 749 S.E.2d 612 (2013) (quoting Syl. Pt. 2, in part, *Emmel v. State Comp. Dir.*, 150 W. Va. 277, 145 S.E.2d 29 (1965)).

[10] W. Va. Code § 23-5-15.

To lay the necessary background for the issue presented here, we observe that other courts recognize four types of injury-causing risks employees commonly face at work: "(1) risks directly associated with employment; (2) risks personal to the claimant; (3) mixed risks; and (4) neutral risks."[11] The first category of risks includes all the obvious kinds of personal injuries that happen at work and are directly related to the work, such as a coal miner who is injured when a rock falls from the ceiling of the mine and strikes his head.[12] These are universally compensable. The second category—personal risks—includes those risks that are so clearly personal that they could not possibly be attributed to employment, and are not compensable.[13] The third category, which is mixed risks, involves the narrow group of cases where a personal risk and an employment-related risk combine to produce an injury.[14] "The most common example is that of a person with a weak heart who dies because of strain occasioned by the employment."[15] In these cases,

[11] *In re Margeson*, 27 A.3d 663, 672 (N.H. 2011); *see also Larson's* §§ 4.01 to 4.04, at 4-2 to 4-5.

[12] *See*, *e.g.*, *Riley v. All. Coal, LLC*, No. 18-0586, 2019 WL 2406701, at *1 (W. Va. May 30, 2019) (holding coal miner was injured in the course of and resulting from his employment when rocks fell from the ceiling of the mine and struck his helmeted head).

[13] *See*, *e.g.*, *Sellers v. W. Va. Univ.--BOR*, No. 15-0379, 2016 WL 1203813, at *2 (W. Va. Mar. 25, 2016) (memorandum decision) (rejecting claim as not work related when professor felt tired while teaching a class and on the way to her office, she blacked out and fell; the evidence showed the likely cause of the fall was an episode of syncope).

[14] *Larson's* § 4.04 at 4-4.

[15] *Id*.

if the employment was a contributing factor to the death or injury, the underlying personal cause will generally not defeat compensability.[16]

Finally, neutral risks are "neither distinctly employment nor distinctly personal" in character.[17] Courts have held that an unexplained fall that occurs while an employee walks across an even workplace floor is considered a neutral risk.[18] They can also include the type of risk Mr. Hood encountered while leaving the customer's residence after making a delivery: the risk of being injured while descending a relatively short, non-defective staircase.[19] The act of walking down stairs is an everyday, commonplace activity, which most people do on a daily basis, whether at home, work, or in a retail

[16] *Id.*; *see*, *e.g.*, *Lester v. EQT Corp.*, No. 14-0033, 2015 WL 303793, at *2 (W. Va. Jan. 23, 2015) (memorandum decision) (holding evidence failed to establish a credible causal connection between claimant's heart attack and his work conditions on the day he died).

[17] *Larson's* § 4.03 at 4-3.

[18] *See*, *e.g.*, *Mitchell v. Clark County Sch. Dist.*, 111 P.3d 1104, 1106 n.7 (Nev. 2005) ("An unexplained fall, originating neither from employment conditions nor from conditions personal to the claimant, is considered to be caused by a neutral risk, while a fall caused by the claimant's personal condition is deemed idiopathic."); *accord In re Doody*, 235 A.3d 1000, 1005 (N.H. 2020).

[19] *In re Margeson*, 27 A.3d 663 (N.H. 2011).

establishment. Not surprisingly, this category of risk creates the most controversy in modern workers compensation law.[20]

To determine whether an injury caused by a neutral-risk activity resulted from employment, most jurisdictions use the "increased-risk test,"[21] which "examines whether the employment exposed the claimant to a risk greater than that to which the general public was exposed."[22] For example, *In re Margeson*[23] involved an injury while traversing a set of stairs. As the Supreme Court of New Hampshire explained the analysis,

> [u]nder the increased-risk test, an employee may recover if his injury results from a risk greater than that to which the general public is exposed. Importantly, even if the risk faced by the employee is not *qualitatively* peculiar to the employment, the injury may be compensable as long as he faces an increased *quantity* of a risk.[24]

The court went on to explain that Mr. Margeson could meet this increased-risk test by showing that he was required to use stairs more frequently than a member of the general

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[20] *Larson's* Chap. 4 at 4-1.

[21] *Id*. § 3.03 at 3-5.

[22] *Rio All Suite Hotel & Casino*, 240 P.3d 2, 6 (Nev. 2010).

[23] 27 A.3d 663.

[24] *Id*. at 672.

public as part of his job, or had to climb unusually high or steep stairs that increased the risk of injury.[25]

We have not explicitly adopted the increased-risk test. In *Emmel v. State Compensation Director*, we cautioned against this Court adopting "any fixed rule or formula" when determining whether a claimant met the "resulting from" element of compensability considering the highly fact-specific nature of this inquiry.[26] But we recently addressed the issue of compensability in several memorandum decisions including *Constellium Rolled Products Ravenswood v. Barnette*,[27] *Hypes v. Jackie Withrow Hospital*,[28] and *King v. Constellium Rolled Products*,[29] and affirmed rulings when the *factfinder* used an analysis like the increased-risk test. As these cases illustrate, this test

[25] *Id.*; *see also Rio All Suites Hotel & Casino v. Phillips*, 240 P.3d at 6 (affirming hearing officer's decision finding the claim compensable when blackjack dealer at casino twisted her ankle while walking down stairs leading to the breakroom; six trips up and down two flights of stairs each shift subjected Ms. Phillips to a significantly greater risk of injury than the risk faced by the general public).

[26] 150 W. Va. at 282, 145 S.E.2d at 33.

[27] 2019 WL 6048317, at *1 (W. Va. Nov. 15, 2019) (memorandum decision).

[28] 2016 WL 1164171, at *1–2 (W. Va. Mar. 24, 2016) (memorandum decision).

[29] 2019 WL 6702654, at *1 (W. Va. Dec. 6, 2019) (memorandum decision).

can be a useful tool when deciding compensability when the injury occurred while the employee was engaged in a neutral-risk activity.[30]

We start with *Barnette*, where the ALJ evaluated the circumstances surrounding the injury and concluded that it was more probable than not that the claimant received an injury in the course of and resulting from his employment. Mr. Barnett, a crane operator, was climbing crane stairs when his knee popped and gave out; he did not fall or twist his knee.[31] At the time, Mr. Barnett "was at the 44th or 46th step, near the top. He testified that he makes that climb four or five times a shift. Mr. Barnette stated that he had no prior left knee injuries or symptoms."[32] The Office of Judges reversed the claim administrator's decision and found the claim was compensable. The Board of Review adopted the findings of fact of the ALJ. On appeal, we affirmed because the evidence supported the finding that Mr. Barnett's knee injury was caused by his employment.[33] It was clear that Mr. Barnett used stairs more frequently than a member of the general public as part of his job and faced an increased risk of injury, similar to *In re Margeson*.

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[30] *See Appeal of Doody*, 235 A.3d at 1005 ("The increased-risk test applies only to neutral risks.") (emphasis original).

[31] 2019 WL 6048317, at *1.

[32] *Id*. at *2.

[33] *Id*.

In *Hypes*, the factfinder rejected the claim after finding that descending a flight of stairs did not place a security guard at a greater risk of injury.[34] Mr. Hypes was walking down a flight of stairs during his rounds at the hospital where he was employed when his right knee gave out. He did not fall, but his knee began to swell. X-rays taken immediately after the injury revealed that Mr. Hypes's right knee had some arthritic changes. The Office of Judges found that Mr. Hypes's knee buckled while he was engaged in a normal activity of walking; he did not trip or fall and there was no evidence that he faced an increased frequency of stair use. The ALJ attributed Mr. Hypes's knee complaints to his underlying condition of arthritis. That ruling was affirmed by the Board of Review and, ultimately, this Court.

Similarly, in *King*, we affirmed the Board of Review's decision upholding the previous rulings denying compensability for a right knee injury claim when Mr. King was just walking into work "when his right knee popped. He did not trip or stumble on anything."[35] The record revealed that Mr. King had preexisting bilateral knee arthritis and had deformity in both knees.[36] We concurred with the reasoning of the Office of Judges, as affirmed by the Board of Review, that Mr. King's knee "merely gave out while he was

[34] 2016 WL 1164171, at *1-2.

[35] 2019 WL 6702654, at *1.

[36] *Id*. at *2.

traversing the parking lot[,]"[37] and there was nothing to suggest that he faced an increased risk of injury. Mr. King failed to show that his work caused the injury; his injury was not peculiar, that is, unique to his employment.

We are mindful that West Virginia Code § 23-4-1(a) requires a claimant to show, by a preponderance of the evidence,[38] that he received an injury in the course of and resulting from his employment, nothing more. The statute is very clear that, for our purposes, we are dealing with one overall standard. So while we decline to declare a new legal standard by judicial fiat—these types of cases differ only in degree from other compensation cases involving causation in myriad differing fact patterns—the factfinder certainly may weigh the nuances surrounding how the injury occurred to resolve the ultimate question of whether the claimant met his burden of proof of showing it was work

[37] *Id*.

[38] W. Va. Code § 23-4-1g (2003); *see Frazier v. Gaither*, 248 W. Va. 420, __, 888 S.E.2d 920, 925 (2023) ("proof by a preponderance of the evidence contemplates evidence that weighs more heavily in favor of one side than the other; thus, the evidentiary scale is not balanced, but rather, tips at least slightly in favor of the party who bears the burden of proof.").

connected.[39] As decision-making goes, the factfinder in a workers compensation case is the ALJ or hearing examiner—not this Court.[40]

We take this opportunity to hold that in the context of workers' compensation law, there are four types of injury-causing risks commonly faced by an employee at work: (1) risks directly associated with employment; (2) risks personal to the claimant; (3) mixed risks; and (4) neutral risks. The factfinder may use the increased-risk test when deciding whether an employee sustained a compensable injury under West Virginia Code § 23-4-1(a) (2018), in cases where the injury occurred while the employee was engaged in a neutral risk activity. Under the increased-risk test, even if the risk faced by the employee is not qualitatively peculiar to the employment, the injury may be compensable if he faced an increased quantity of a risk.

[39] *See McDonough v. Connecticut Bank & Tr. Co.*, 527 A.2d 664, 667 (Conn. 1987) ("It is clear that the twin issues of 'accidental injury' and 'arising out of and in the course of employment' coalesce on occasion.").

[40] The Board of Review assumed the role of factfinder in workers' compensation cases on July 1, 2022. *See* W. Va. Code § 23-5-8a(a) (2022) (providing, in part, that "All powers and duties of the Office of Judges to review objections, protests, or any other matter authorized by this chapter, shall be transferred to the Workers' Compensation Board of Review on July 1, 2022[.]"). The Legislature directed that it "shall employ hearing examiners and other personnel that are necessary for the proper conduct of a system of administrative review of objections to decisions of the Insurance Commissioner, private carriers, and self-insured employers[.]" § 23-5-8a(b).

In this case, the ALJ found no causal connection between Mr. Hood's work and his injury; Mr. Hood simply took a step down a stair and, coincidentally, his knee "blew out" and became symptomatic. The ALJ stated that the "facts of this case are only slightly different than the *King* decision because the claimant was walking down steps when he felt pain[,]" but like Mr. King, Mr. Hood "did not slip, trip or fall, and he was not carrying materials related to his employment." While this Court acknowledges that *King* and *Hypes* are somewhat distinguishable because there is no evidence that Mr. Hood suffered from arthritis in his knee,[41] we still give deference to the ALJ's finding that Mr. Hood failed to show by a preponderance of the evidence that his knee injury resulted from his employment. Mr. Hood's risk of being injured while descending a short set of stairs was not qualitatively peculiar to the employment, nor did he face an increased quantity of a risk.

We reject Mr. Hood's contention that *American Medical Facilities v. Parsons*[42] is more factually similar than *King*. In *Parsons*, the factfinder was evaluating an injury within the first category of risk—risks directly associated with employment because the mechanism of injury was clear. Ms. Parsons, a nurse, injured her head, left elbow, and left knee when she fell at work while walking through a tunnel, headed to lunch,

[41] When Mr. Hood was seen in the emergency department, an x-ray of his right knee showed some degenerative changes. But he denied having any previous problems with this knee.

[42] 2021 WL 1595434, at *1 (W. Va. Apr. 23, 2021) (memorandum decision).

"when her feet 'got stuck' and she fell to the ground."[43] This Court affirmed the Board of Review's decision which found the claim compensable. We concurred that Ms. Parsons sustained an injury in the course of and resulting from her employment when she slipped, fell, and was injured while walking to an employer-owned breakroom for a mandated lunch break.[44] *Parsons* is distinguishable for the obvious reason that Mr. Hood did not get his foot stuck on the step which led to a fall resulting in a knee sprain. As discussed above, slightly different fact patterns yield different results in cases involving compensability.

For these reasons, we concur with the Board of Review's decision rejecting the claim due to lack of a causal connection between Mr. Hood's injury and his employment.

IV. CONCLUSION

While Mr. Hood's injury occurred while working, it did not result from his employment. So, we affirm the August 23, 2021, order of the Board of Review.

Affirmed.

[43] *Id*. at *2.

[44] *Id*. at *3.