

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

CRYSTAL G. WHITT,
Claimant Below, Petitioner

vs.) **No. 18-1120** (BOR Appeal No. 2052866)
(Claim No. 2017004180)

MULLENS MANOR, INC.,
Employer Below, Respondent

FILED
January 24, 2020
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Crystal G. Whitt, by Counsel Reginald D. Henry, appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Mullens Manor, Inc., by Counsel H. Dill Battle III, filed a timely response.

The issue on appeal is the addition of secondary conditions to the claim and medical treatment. On June 13, 2017, the claims administrator denied authorization for a pain clinic evaluation and the addition of a diagnosis code for lumbar herniated disc. The Office of Judges affirmed the claims administrator's decision on April 27, 2018. This appeal arises from the Board of Review's Final Order dated December 3, 2018, in which the Board affirmed the decision of the Office of Judges.

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.

Ms. Whitt, a nurse floor supervisor, sustained an injury to her neck and the left side of her body when she fell onto a concrete floor while at work on August 9, 2016. An Employees' and Physicians' Report of Occupational Injury signed on August 10, 2016, described the injury as tibial plateau fracture and listed the body part injured as the left knee. Robert Pennington, M.D., examined Ms. Whitt and performed an open reduction and internal fixation of the tibial plateau fracture on August 11, 2016. An operative report noted a diagnosis of depressed lateral tibial plateau fracture, comminuted. A second Employees' and Physicians' Report of Occupational Injury was completed on August 15, 2016, and stated that Ms. Whitt injured her middle back, left

leg, left hip, left foot, and left knee. On August 18, 2016, the claims administrator held the claim compensable for left knee fracture.

Ms. Whitt treated with Mustafa Rahim, M.D., on August 22, 2016. In his notes, Dr. Rahim did not document low back pain or a lumbar spine injury. Ms. Whitt returned to Dr. Rahim on November 18, 2016, for a follow-up appointment. Dr. Rahim noted that she was undergoing physical therapy and continued to have knee pain, as well as spasms in her back. Dr. Rahim's assessment was muscle spasm of the back. He ordered her to continue physical therapy and to return to him to discuss her back.

On November 28, 2016, Ms. Whitt was examined by Jan P. DeRoos, M.D., with Raleigh General Hospital. Dr. DeRoos noted that Ms. Whitt exhibited some mid back discomfort since her accident and that extensive scans of the lumbar, thoracic, and the cervical spine did not find any fractures. Dr. DeRoos found mild tenderness around the thoracolumbar area on palpation, but no rib pain. Her impression in relation to the back examination was chronic mid back pain. Ms. Whitt continued to experience back pain and returned to Dr. Rahim on December 15, 2016, with complaints of neck spasm. Physical examination did not find peripheral edema and peripheral pulses were symmetrically present. Dr. Rahim's assessment was muscle spasm of the back.

Ms. Whitt was examined by Clifford Roberson, M.D., on January 11, 2017. Dr. Roberson noted that x-rays of the tibia and fibula showed healing/healed proximal left tibial and fibular fractures. He requested authorization for continued physical therapy, a lumbar spine MRI, and physical therapy for the lumbar spine. Dr. Roberson requested authorization for an MRI of the lumbar spine and assessed Ms. Whitt's condition as lumbar sprain/strain and back pain. The claims administrator denied Dr. Roberson's request for a lumbar MRI and lumbar physical therapy. On February 15, 2017, the Street Select Grievance Board ("Grievance Board") reconsidered the claims administrator's denial of the request. The Grievance Board noted the claim is allowed for tibia fracture, which was treated surgically. It was also noted that Ms. Whitt was released to return to work on a light duty basis. The Grievance Board found that it was reasonable to allow an MRI for diagnostic purposes. On February 24, 2017, the claims administrator authorized a lumbar spine MRI but denied the request for lumbar physical therapy.

Bruce A. Guberman, M.D., performed an independent medical evaluation of Ms. Whitt on February 27, 2017. In his report, Dr. Guberman noted Ms. Whitt's complaints of constant pain, especially over the posterior aspect of her knee and proximal tibia. She reported knee stiffness and swelling. Dr. Guberman recorded her prior history of back injuries.¹ Her history includes a motor

¹ The record shows that Ms. Whitt has had prior injuries to her low back as well as symptoms which could be consistent with a lumbar herniated disc. Ms. Whitt testified that she first sought medical treatment for her low back in 2011 at Welch Community Hospital. In 2013, she sustained an injury to her back while picking up a resident and again sought treatment at Welch Community Hospital. On November 16, 2015, Ms. Whitt sustained a third back injury while lifting and turning/bending while working at an assisted living facility. On a pain diagram, Ms. Whitt illustrated an area of pain near the sciatic notch and slightly left of the midline which radiated down through her buttock and into her left thigh.

vehicle accident in May 2016, when she suffered a bruise to her left leg and her symptoms resolved within two weeks. Ms. Whitt also suffered a lower back injury approximately two years before while lifting a patient out of a van at work. She missed work for one day, and she received no impairment rating for the injury. Dr. Guberman diagnosed status-post depressed lateral tibial plateau fracture, comminuted with ORIF and status-post proximal fibular fracture. Dr. Guberman opined that her lumbar spine should not be a compensable component of this claim and noted that she has had low back pain since an injury that occurred two years prior. Also, Dr. Guberman found that the records and discharge notes from her initial hospitalization did not diagnose a lumbar spine injury. It was Dr. Guberman's opinion that Ms. Whitt's low back pain is related to her prior low back injury.

Ms. Whitt underwent a lumbar MRI on March 14, 2017. Radiologist Shawn Reesman, M.D., found evidence of desiccation of the L4-5 disc with loss of disc height, and a left paracentral disc protrusion with small annular rent. Dr. Reesman noted that the small herniation does not deform the thecal sac. His impression was desiccation and loss of disc height at L5-S1 with left paracentral small disc protrusion with annular rent, which was non-compressive.

On March 28, 2017, Ms. Whitt treated with George M. Charron, M.D., who noted that she recently had a lumbar spine MRI and the study showed a small central disc herniation at L5-S1 with a bright zone in the posterior annulus. Dr. Charron's assessment was left knee pain and "other chronic pain." Dr. Charron recommended referral for possible spinal injection. Dr. Charron examined Ms. Whitt once again on April 17, 2017, for hardware removal. He requested authorization for a pain clinic referral for her low back and the addition of the diagnosis of L5-S1 disc herniation with persistent pain. He recommended physical therapy for stiffness in the left knee. In his report, Dr. Charron recorded that Ms. Whitt noted significant lumbar back pain. He felt that she was a good candidate for spinal injection.

Rebecca Thaxton, M.D., performed an Office of Medical Management Physician Review for the claims administrator on April 27, 2017. In her report, Dr. Thaxton recommended the denial of adding a diagnosis of lumbar herniated disc and authorizing a pain clinic referral. She recommended the denial of adding a diagnosis of lumbar herniated disc to the claim and recommended denial of a pain management referral. She noted that the admission history on August 10, 2016, had no mention of a low back injury or low back radicular symptoms. Dr. Thaxton concluded that the medical evidence does not support adding the lumbar spine condition to the claim. She agreed with Dr. Guberman's February 27, 2017, assessment that Ms. Whitt's low back pain is related to her prior low back history. On May 3, 2017, the claims administrator issued a decision denying authorization of pain clinic evaluation and addition of a lumbar diagnosis. Following a Grievance Board protest, the claims administrator issued a claim decision on June 13, 2017, denying a pain clinic evaluation and the addition of a diagnosis code for the lumbar spine.

On October 4, 2017, Ms. Whitt was deposed. She testified that she was standing on a hot water heater approximately two feet tall and fell onto a concrete floor. She stated that she had pain in her back and lower back when she arrived at the hospital. She testified that she sought treatment four times for her lower back prior to her August 9, 2016, injury. In 2011, she was treated for low back pain at Welch Community Hospital. In 2013, she strained her lower back after lifting a

resident. Although she missed two days of work, she did not file a claim. She also testified that on May 16, 2015, she was involved in a car accident and needed x-rays of her cervical spine. She further testified that on November 16, 2015, she strained her lower back picking up a resident and helping the patient into a shower. No workers' compensation claim was filed, but she sought treatment at the Emergency Room of Welch Community Hospital. She maintained during her testimony that she did not have low back problems until after her August 9, 2016, injury.

The Office of Judges issued a Decision on April 27, 2018, affirming the claims administrator's Order denying Dr. Charron's request for a pain clinic evaluation and the addition of a diagnosis code for lumbar disc herniation. The Office of Judges found that there is no medical evidence establishing a causal relationship between Ms. Whitt's compensable injury and her L5-S1 herniated disc. The Office of Judges concluded that she failed to establish by a preponderance of the evidence that she is entitled to the addition of a diagnosis code update for lumbar disc herniation or to a referral to the pain clinic. In an Order dated December 3, 2018, the Board of Review adopted the findings of facts and conclusions of law of the Office of Judges, and affirmed its decision.

We agree with the decision of the Office of Judges, as affirmed by the Board of Review. The record indicates that Ms. Whitt has a history of long-standing chronic back pain prior to her compensable injury. Drs. Guberman and Thaxton both opined that her lumbar condition is not the result of the August 9, 2016, injury. Because the objective medical evidence does not support the addition of lumbar disc herniation as a compensable condition in this claim, the Board of Review's Order of December 3, 2018, should be affirmed. Accordingly, the denial of authorization for a pain clinic evaluation was appropriate because the treatment is not reasonably required and medically related to the compensable injury and is for treatment of a non-compensable chronic condition.

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: January 24, 2020

CONCURRED IN BY:

Chief Justice Tim Armstead
Justice Elizabeth D. Walker
Justice Margaret L. Workman
Justice Evan H. Jenkins
Justice John A. Hutchison