

SUPREME COURT OF APPEALS OF WEST VIRGINIA

Herbert Wendling v. Yellow Transportation, Inc.

Wendling · No. No. 11-0975 · Decided May 14, 2013

SUMMARY

The Supreme Court of Appeals of West Virginia affirmed a Workers’ Compensation Board of Review decision denying the addition of right knee degenerative joint disease as a compensable component of Herbert Wendling’s workplace injury. The court held that the degenerative condition pre-existed the compensable injury and that the evidence did not support an additional permanent partial disability award.

CASE DETAILS

COURT	Supreme Court of Appeals of West Virginia
WRITING FOR THE COURT	Per Curiam; Chief Justice Brent D. Benjamin; Justice Robin J. Davis; Justice Margaret L. Workman; Justice Menis E. Ketchum; Justice Allen H. Loughry II
JURISDICTION	West Virginia
DECIDED	May 14, 2013
DOCKET	No. 11-0975
DISPOSITION	affirmed
PROCEDURAL POSTURE	Herbert Wendling appealed the West Virginia Workers’ Compensation Board of Review’s affirmance of an Office of Judges order, which had affirmed the claims administrator’s denial of his request to add right knee degenerative joint disease as a compensable component of his injury.
STANDARD OF REVIEW	The Board of Review’s decision would be affirmed unless it was in clear violation of a constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based on a material misstatement or mischaracterization of the evidentiary record; the Court also applied a clearly-wrong review to the Board’s affirmance of the Office of Judges’ factual findings.
PRECEDENTIAL VALUE	Published memorandum decision
PARTIES	Herbert Wendling v. Yellow Transportation, Inc.

TOPICS

workers compensation

administrative procedure act

standard of review

appellate procedure

PRACTICE AREAS

workers compensation

administrative law

appellate procedure

QUESTIONS PRESENTED

1. Whether the evidence supported adding right knee degenerative joint disease as a compensable component of Wendling's workers' compensation claim.
2. Whether the Workers' Compensation Board of Review was clearly wrong or otherwise acted unlawfully in affirming the denial of that request.

HOLDINGS

1. The preponderance of the evidence established that Wendling's right knee degenerative joint disease pre-existed the compensable injury and was not work-related; therefore, it was properly excluded from the claim.
2. The Board of Review's decision was not in clear violation of a constitutional or statutory provision, was not clearly the result of erroneous conclusions of law, and was not based on a material misstatement or mischaracterization of the evidentiary record.

KEY QUOTATIONS

"The preponderance of the evidence weighs in favor of finding that the additional 4% impairment recommended by Dr. Guberman for Mr. Wendling's degenerative joint disease pre-existed his compensable injury and was not work-related." (at 2)

"Therefore, the decision of the Board of Review is affirmed." (at 2)

FACTUAL BACKGROUND

Wendling, a truck driver for Yellow Transportation, injured his right knee on March 27, 2009, when his foot caught on steel while he was walking on a loading dock, causing him to twist the knee and strike it against a pipe. He received a 4% permanent partial impairment award for right knee strain and medial and lateral meniscal tears. He sought to add degenerative joint disease as a compensable component, but the claims administrator, Office of Judges, and Board of Review determined that the degenerative changes pre-existed the work injury and were not work-related.

PROCEDURAL HISTORY

The claims administrator granted Wendling a 4% permanent partial disability award for right knee strain and medial and lateral meniscal tears but denied his request to add degenerative joint disease as a compensable condition. The Workers' Compensation Office of Judges affirmed that decision, and the Board of Review

affirmed the Office of Judges on June 8, 2011. The Supreme Court of Appeals of West Virginia affirmed the Board's final order.

DISPOSITION

affirmed

OPINION

PER CURIAM.

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS FILED May 14, 2013 RORY L. PERRY II, CLERK HERBERT WENDLING, SUPREME COURT OF APPEALS OF WEST VIRGINIA Claimant Below, Petitioner vs.) No. 11-0975 (BOR Appeal No. 2045355) (Claim No. 2008037017) YELLOW TRANSPORTATION, INC., Employer Below, Respondent MEMORANDUM DECISION Petitioner Herbert Wendling, by William B. Gerwig III, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review.

Yellow Transportation, Inc., by Patricia E. McEnteer, its attorney, filed a timely response. This appeal arises from the Board of Review's Final Order dated June 8, 2011, in which the Board affirmed a November 29, 2011, Order of the Workers' Compensation Office of Judges.

In its Order, the Office of Judges affirmed the claims administrator's April 29, 2009, decision granting the claimant 4% permanent partial disability for right knee strain and right knee medial and lateral meniscal tears, and the claims administrator's June 1, 2009, denial of Mr. Wendling's request to add right knee degenerative joint disease as a compensable component of the injury.

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. Wendling was employed as a truck driver for Yellow Transportation, Inc. On March 27, 2009, he caught his foot on a piece of steel while walking on a loading dock. He twisted his right knee, stepped backward, and hit his right knee against a pipe. Mr. Wendling was granted a 4% permanent partial impairment award for right knee strain and right knee medial and lateral meniscal tears.

Mr. Wendling then requested the addition of degenerative joint disease as a 1 compensable component of his injury. The claims administrator denied Mr. Wendling's request, leading to this appeal. The Office of Judges affirmed the claims administrator's decision.

The Office of Judges found, based on a preponderance of the evidence, that the degenerative disease in Mr. Wendling's right knee pre-existed his compensable injury. Although the Office of Judges considered a report by Dr. Guberman, who attributed an additional 4% whole body impairment from Mr. Wendling's injury, the Office of Judges found that Dr. Guberman had not considered pre-existing degenerative changes in Mr. Wendling's knee.

Instead, the Office of Judges based this determination on the evaluation by Dr. Bachwitt, which considered a range of causes besides Mr. Wendling's work. Dr. Bachwitt believed that the degenerative changes, accounting for the additional 4% impairment rating in Dr. Guberman's report, would take years to develop and, therefore, were not related to Mr. Wendling's compensable injury.

The Office of Judges found that the damage in Mr. Wendling's knee was the result of degenerative changes and not the work-related injury. The Board of Review adopted the findings of the Office of Judges and affirmed its Order on June 8, 2011.

We agree with the Office of Judges' findings and reasoning. The preponderance of the evidence weighs in favor of finding that the additional 4% impairment recommended by Dr. Guberman for Mr. Wendling's degenerative joint disease pre-existed his compensable injury and was not work-related.

The Board of Review was not clearly wrong to affirm the Office of Judges Order. 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: May 14, 2013
CONCURRED IN BY: Justice Robin J. Davis Justice Margaret L. Workman Justice Allen H. Loughry II
DISSENTING: Chief Justice Brent D. Benjamin Justice Menis E. Ketchum 2