

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JASON R. GILL, Petitioner

vs.) No. 101265 (BOR Appeal No. 2044251)
(Claim No. 2010103425)

FILED

November 8, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WADE'S REPAIR SERVICES, INC., Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated September 2, 2010, in which the Board affirmed a February 11, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's November 19, 2009, Order, which rejected Mr. Gill's claim for benefits. The appeal was timely filed by the petitioner, and Wade's Repair Services, Inc. filed a response. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the parties' submissions and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the Office of Judge's Order, which rejected Mr. Gill's claim for benefits. Mr. Gill reportedly sustained a lower back injury at work on either August 19, 2009, or August 20, 2009; however, due to inconsistencies in Mr. Gill's account, his claim was denied. Mr. Gill argues that his inability to remember the exact date of his injury does not make his statements inconsistent as other facts have remained constant, including the time that he allegedly sustained his injury, the manner in which it was sustained, and to whom Mr. Gill reported the injury. Further, Mr. Gill states that the subject

alleged injury is distinct from an earlier compensable back injury because, with the prior lower back injury, Mr. Gill experienced pain that radiated down his left leg. But, with the subject alleged injury, pain has radiated down his right leg. Finally, there is no evidence of disc herniation until following his alleged August 2009 injury.

The Office of Judges noted that, despite Mr. Gill's assertion that he did not receive treatment for back pain related to his prior back injury from 2003 to 2009, Dr. Michael Kostenko's office notes indicate otherwise. (Feb. 11, 2010, Office of Judges Order, p. 5.) To the contrary, Mr. Gill reported severe low back pain only four days prior to his alleged injury. *Id.* Also, Mr. Gill stated that he reported to Appalachian Regional Hospital following his alleged injury; however, there is no documentation to support this. *Id.* at p. 7. Although Mr. Gill's chiropractor, Julian Chipley, opined that the alleged subject injury is distinct from Mr. Gill's prior low back injury, this conclusion was based in part on the length of time between treatment for his first injury and the subject alleged injury. Chiropractor Chipley, however, was not aware of the treatment Mr. Gill was receiving from Dr. Kostenko immediately prior to his alleged injury; accordingly, little weight was given to this conclusion. *Id.* at p. 8. Due to these inconsistencies, the Office of Judges found that a preponderance of the evidence failed to establish that Mr. Gill suffered a compensable injury on either August 19, 2009, or August 20, 2009. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its September 2, 2010, decision.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the rejection of Mr. Gill's claim for benefits is affirmed.

Affirmed.

ISSUED: November 8, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Menis E. Ketchum

Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin