

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

JOSEPH SCALISE, Petitioner

February 24, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**vs.) No. 101362 (BOR Appeal No. 2044315)
(Claim No. 2009057991)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WHEELING ISLAND GAMING, INC., Respondent**

MEMORANDUM DECISION

Petitioner, Joseph Schalise, by Christopher J. Wallace, his attorney, appeals the Board of Review order denying authorization of displaced thoracic disc as a compensable component. Wheeling Island Gaming, Inc., by Gary W. Nickerson, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated October 12, 2010, in which the Board affirmed a March 24, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of authorization of the diagnosis displaced thoracic disc. 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 petition, response, 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 held Mr. Scalise does not suffer from displaced thoracic disc nor is there a causal connection between the requested diagnosis and the compensable

injuries suffered by Mr. Scalise. Mr. Scalise asserts the MRI study shows “slight annular bulging at T8-T9 and right posterolateral disc bulge at T9-T10 of doubtful significance” which establishes Mr. Scalise suffers from displaced thoracic disc. On the other hand, Wheeling Island Gaming, Inc. asserts Mr. Scalise failed to make the requisite preponderance of the evidence showing for the addition of the diagnosis of displaced thoracic disc. Further, the MRI and neurosurgical studies establish that displaced thoracic disc is not present in this case.

The OOJ held that Dr. Rebecca Thaxton produced a reliable report regarding Mr. Scalise’s protest to the denial of compensability for displaced thoracic disc. (March 24, 2010, Office of Judges Order, p. 4). It found the “MRI study and neurological consultation confirm that the requested compensable component, displaced thoracic disc, is not present in the MRI testing, nor, was it found during [Mr. Scalise’s] neurosurgical consultation.” *Id.* Additionally, it held the January 2009 MRI report indicates Mr. Scalise is suffering from degenerative changes, which likely predate the physical compensable injuries in the claim. *Id.* The Office of Judges, too, found no basis for compensability or temporary total benefits, or for disputing the Claims Administrator’s findings. The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of October 12, 2010.

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 is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the Court affirms the Board of Review order denying Mr. Scalise’s request for authorization of displaced thoracic disc as a compensable component.

Affirmed.

ISSUED: February 24, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum