

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 31, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

JAMES D. SHIRLEY, Petitioner

vs.) **No. 11-0405** (BOR Appeal No. 2045044)
(Claim No. 2008045255)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
JIMMIE A. RINKER, Respondent**

MEMORANDUM DECISION

Petitioner James D. Shirley, by Gaynor Cosner III, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Jimmie A. Rinker, by Gary Nickerson and James Heslep, his attorneys, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 4, 2011, in which the Board reversed a September 9, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's February 8, 2010, decision denying Mr. Shirley's request to reopen the claim based on a finding that his current condition was not related to his compensable injury. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Having considered the petition 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.

On May 29, 2008, Mr. Shirley injured his lower back while employed as a tractor trailer driver for Jimmie Rinker. The claim was held compensable and Mr. Shirley was diagnosed with a disc extrusion at L5-S1; on July 7, 2008, he underwent a laminotomy, microdiscectomy, and partial foraminotomy bilaterally to treat this injury. On October 1, 2008, Mr. Shirley returned to work without restrictions. On November 11, 2008, Dr. Guberman performed an independent medical evaluation and found that Mr. Shirley had reached maximum medical improvement. On

November 25, 2008, the claims administrator closed the claim for temporary total disability benefits. On February 1, 2010, Mr. Shirley was clearing snow off his personal vehicle with a broom when he began to experience pain in his lower back that radiated down his leg. On the same day, Mr. Shirley sought treatment with Dr. Evans-Wood, his personal physician. She noted that Mr. Shirley was experiencing pain, but did not mention the cause. Mr. Shirley requested that the claim be reopened at this time.

In its decision reversing the Office of Judges, the Board of Review held that the Office of Judges' analysis and conclusions were clearly wrong in view of the reliable, probative, and substantial evidence of record. The Board of Review then reinstated the February 8, 2010, claims administrator's decision.

In its Order, the Office of Judges found that Mr. Shirley triggered an exacerbation of his compensable injury while removing snow from his vehicle on February 1, 2010. In its Order, the Board of Review noted that Mr. Shirley had reached maximum medical improvement and had returned to his previous employment. The Board of Review found that there is no medical evidence relating Mr. Shirley's current symptoms to his compensable injury. The Board of Review further found that the evidence of record fails to demonstrate that an aggravation or progression of the compensable injury occurred. We agree with the reasoning and conclusions of the Board of Review.

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: October 31, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum
Justice Margaret L. Workman