

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

June 12, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BRIAN K. JOYCE,
Claimant Below, Petitioner

vs.) **No. 11-1149** (BOR Appeal No. 2045427)
(Claim No. 2009067089)

UNITED PARCEL SERVICE, INC.,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Brian K. Joyce, by John H. Shumate Jr., his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. United Parcel Service, Inc., by Jeffrey B. Brannon, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated July 11, 2011, in which the Board reversed a December 15, 2010, Order of the Workers' Compensation Office of Judges and remanded the claim for further evidentiary development. In its Order, the Office of Judges reversed the claims administrator's July 15, 2009, decision denying Mr. Joyce authorization for an anterior cervical discectomy and fusion of C5-6 and C6-7. 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. Joyce was in the employment of United Parcel Service, on October 30, 2008, when his truck was hit head-on by a school bus. Mr. Joyce received injuries to his neck, upper back, left wrist, and left foot. He was diagnosed with lumbar strain, a strain of the neck, and a contusion of the chest. These conditions were deemed compensable by the claims administrator on December 2, 2008. Mr. Joyce received various treatments at the suggestion of his treating physician, Dr. Oar, including physical therapy and chiropractic services, but continued to have pain in his neck and back. On January 28, 2009, Mr. Joyce had an MRI of his cervical spine

which revealed midline disc bulging at the C5-6 and C6-7 discs. Mr. Joyce was then evaluated by a neurosurgeon, Dr. Greenberg, who recommended that Mr. Joyce undergo cervical spine surgery. Following a second MRI, that recommendation was repeated by Dr. Bailes. Dr. Oar requested authorization for anterior cervical discectomy and fusion of the C5-6 and C6-7 discs. On July 15, 2009, the claims administrator denied authorization for the surgery. Following the denial of his request, Dr. Oar, on August 25, 2009, requested the addition of intervertebral disc disorder with myelopathy, which would cover herniations in the cervical spine, as a compensable condition of Mr. Joyce's claim. The claims administrator has not made a decision on this request.

Although Mr. Joyce's protest of the claims administrator's decision was not timely filed, the Office of Judges granted his motion to file a late protest on December 3, 2009, and on December 15, 2010, reversed the claims administrator's July 15, 2009, denial, stating that a preponderance of the evidence weighed in favor of finding that the requested surgery reasonably related to Mr. Joyce's compensable injury. The Office of Judges based this determination on the reports of Dr. Oar, Dr. Greenberg, and Dr. Bailes, who all recommended that Mr. Joyce undergo surgery to remedy the herniation in his C5-6 and C6-7 discs.

The Board of Review reversed the December 15, 2010, Order of the Office of Judges and remanded the claim to the claims administrator for a full development of the claim. The Board of Review determined that the requested surgery did not relate to any of Mr. Joyce's compensable conditions. Instead the surgery related to herniations in Mr. Joyce's cervical spine which would be covered under the diagnosis of intervertebral disc disorder with myelopathy, which Dr. Oar had requested be added to the list of Mr. Joyce's compensable conditions. Since the claims administrator had not made a decision with respect to that diagnosis, the Board of Review held that any determination concerning the authorization for surgery would be premature. The Board of Review found that there was good cause to remand the claim and ordered the claims administrator to issue a protestable order either adding or denying intervertebral disc disorder with myelopathy to Mr. Joyce's compensable conditions.

We agree with the findings and reasoning of the Board of Review. There is no evidence demonstrating that the requested surgery reasonably related to any of the conditions which had previously been held compensable under this claim. The July 14, 2009, request for authorization from Dr. Oar indicates that the need for surgery related to Mr. Joyce's intervertebral disc disorder, which had not been determined to be compensable under this claim. The Board of Review was within its discretion to remand the claim until a protestable decision relating to this diagnosis has been issued.

In the alternative, the respondent argues that the case should be dismissed because Mr. Joyce's protest to the claims administrator's July 15, 2009, decision was untimely filed with the Office of Judges, according to the sixty day time limit set out in West Virginia Code § 23-5-1(b)(1) (2009). However, West Virginia Code § 23-5-6 (2003) gives the Office of Judges discretion to excuse an untimely filing for good cause. The Office of Judges acted within its discretion.

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: June 12, 2013

CONCURRED IN BY:

Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

DISSENTING:

Chief Justice Brent D. Benjamin