

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**JAMES SMITH, Petitioner**

**November 10, 2011**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**vs.) No. 101196 (BOR Appeal No. 2043956)**  
**(Claim No. 2009095228)**

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER and**  
**CONSOLIDATION COAL COMPANY, Respondent**

**MEMORANDUM DECISION**

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated August 23, 2010, in which the Board reversed a December 18, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's July 3, 2009, Order finding the claim non-compensable. The appeal was timely filed by the petitioner and a response was filed by Consolidation Coal Company. 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 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 reversed the Office of Judges Order, which found Mr. Smith's claim compensable. Mr. Smith argues the evidence does not support the Board's reversal of the Office of Judge's Order. He maintains that the injury did occur at work and he is not required to prove the exclusion of all else to prove the compensability of the claim. Consolidation Coal Company argues that Mr. Smith failed to provide evidence to show the

injury was work-related, thus the Board of Review was correct in reversing the Office of Judge's Order.

In reversing the Office of Judges, the Board of Review found the preponderance of the evidence demonstrated the injury was not causally related to the work incident. (August 23, 2010, Board of Review Order, p. 3). The Board of Review noted the absence of the work incident in the hospital records when Mr. Smith sought treatment. *Id.* at p. 2. It also noted the lack of external signs of trauma along with a history of pre-existing problems. *Id.* Thus, the Board of Review found the Office of Judges was incorrect in finding the claim compensable.

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 August 23, 2010, Board of Review Order is affirmed.

Affirmed.

**ISSUED: November 10, 2011**

**CONCURRED IN BY:**

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

**DISSENTING:**

Chief Justice Margaret L. Workman  
Justice Menis E. Ketchum