

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**FRANKLIN W. MASON, Petitioner**

**vs.) No. 101399 (BOR Appeal No. 2044337)**  
**(Claim No. 2009054550)**

**FILED**

**December 7, 2011**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**WEST VIRGINIA OFFICE OF  
INSURANCE COMMISSIONER and  
NORTH BECKLEY PUBLIC SERVICE DISTRICT,  
Respondent**

**MEMORANDUM DECISION**

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated October 5, 2010, in which the Board affirmed a March 26, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's May 18, 2009, Order, which denied the request to add herniated disc as a compensable component, and the claims administrator's March 30, 2009, Order, which denied a reopening of the claim for payment of temporary total disability benefits. The appeal was timely filed by the petitioner, and the North Beckley Public Service District 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 denied the addition of herniated disc to Mr. Mason's claim and denied a reopening of his claim for temporary total disability benefits. Mr. Mason argues that the condition of herniated disc should be added to his claim because his treating physician, Dr. Syed Zahir, is in the best position to determine whether he has a herniated disc and whether it is related to his compensable injury.

Similarly, Mr. Mason argues that Dr. Zahir is in the best position to determine whether his condition has progressed or been aggravated, and whether any such progression or aggravation is attributable to his compensable injury. As Dr. Zahir both requested the addition of herniated disc as a compensable component and sought to reopen Mr. Mason's claim due to a progression or aggravation, Dr. Zahir's opinion should be given greater weight than that of the other physicians who merely conducted records reviews.

The Office of Judges first noted that an MRI taken on August 26, 2008, about three weeks after his compensable injury, revealed degenerative disc disease. (Mar. 26, 2010, Office of Judges Order, p. 7.) Dr. ChuanFang Jin also noted L5-S1 clinical posterior and right posterior paracentral disc protrusion, which Dr. Jin noted is common in the general population. *Id.* Dr. Jin stated that only extruding herniated nucleus pulposus is associated with clinical significance. *Id.* Further, Mr. Mason's back pain radiates into his left leg, but the protrusion is located on the right. *Id.* This supports a conclusion that disc protrusion is not likely caused by the compensable injury but is more likely part of preexisting degeneration. *Id.* Dr. Jin found no medical evidence to support trauma related lumbar disc herniated nucleus pulposus. *Id.*

Moreover, Mr. Mason underwent an MRI on May 9, 2003, more than five years prior to this subject compensable injury. *Id.* The MRI revealed a large right paracentral disc protrusion at L5-S1 making contact with the right S1 nerve root centrally. *Id.* Thus, the condition that Mr. Mason seeks to add to this claim predates his compensable injury. *Id.*

With respect to the denial of the request to reopen Mr. Mason's claim on a temporary total disability basis, the Office of Judges relied on the reports of Dr. Charles L. Werntz and Dr. Prasadarao Mukkamala. These doctors found that any inability of Mr. Mason to work is attributable to his preexisting degenerative changes. *Id.* at p. 8. These physicians further stated that Mr. Mason's degenerative condition predated the subject injury. *Id.* Because Mr. Mason seeks to reopen his claim for treatment of a non-compensable, preexisting condition, the Office of Judges denied the request for reopening. *Id.* The Board of Review reached the same reasoned conclusions with respect to both of these issues in affirming the Office of Judges in its October 5, 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 denial of Mr. Mason's

request to reopen his claim and denial of his request to add herniated disc as a compensable component are affirmed.

Affirmed.

ISSUED: December 7, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum