

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 15, 2013

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

**RONALD R. AUSTIN,
Claimant Below, Petitioner**

vs.) **No. 11-0903** (BOR Appeal Nos. 2045453 & 2045546)
(Claim No. 2007033896)

**CITY OF BUCKHANNON,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Ronald R. Austin, by Robert L. Stultz, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. City of Buckhannon, by James Heslep and Gary W. Nickerson, its attorneys, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 10, 2011, in which the Board affirmed the December 15, 2010, and January 19, 2011, Orders of the Workers' Compensation Office of Judges. In its Orders, the Office of Judges affirmed the claims administrator's June 2, 2010, order denying the request to reopen the claim for temporary total disability benefits and August 2, 2010, order denying an L5-S1 transformational lumbar interbody fusion. 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. Austin was employed as a mechanic and equipment operator on October 17, 2007, when he fell from a big truck while attempting to add antifreeze. The claims administrator approved Mr. Austin's claim as compensable for a sprain/strain of the lumbar region, and sprain/strain of the neck and a contusion of the face/scalp/neck. On January 22, 2008, Dr. Joseph Grady found the claimant had reached maximum medical improvement with no permanent impairment due to his October 17, 2007, compensable injury.

On April 16, 2010, Mr. Austin had a L5-S1 transforaminal lumbar interbody fusion performed by Dr. Miele. Then on May 21, 2010, Mr. Austin filed a Claim Reopening Application requesting temporary total disability benefits due to an aggravation or progression of his compensable injury. Dr. Mukkamala prepared a Physician's Review of the claimant's request to reopen the claim for temporary total disability and the L5-S1 transforaminal lumbar interbody fusion and recommended that both the reopening request and the surgery be denied based upon the finding that the claim had been held compensable for soft tissue injuries - that are expected to resolve with 6-8 weeks. Dr. Mukkamala stated that the April 16, 2010, surgery was to address degenerative conditions that are not covered under this claim.

In its Orders, the Office of Judges held that Mr. Austin's spinal fusion was not necessitated by his compensable lumbar sprain/strain on October 17, 2007, and that Mr. Austin had failed to present medical evidence to establish his current condition is the result of an aggravation of the compensable condition. The Board of Review reached the same reasoned conclusion in its decision of May 10, 2011. 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: July 15, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Allen H. Loughry II

DISSENTING:

Justice Margaret L. Workman
Justice Menis E. Ketchum