

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

July 15, 2013

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

**DAVID T. MOUNTS,**  
**Claimant Below, Petitioner**

vs.) **No. 11-1508** (BOR Appeal No. 2046029)  
(Claim No. 2010110128)

**PRESTON MEMORIAL HOSPITAL CORPORATION,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner David T. Mounts, by Patrick Maroney, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Preston Memorial Hospital Corporation, by Gary Nickerson and James Heslep, its attorneys, filed a timely response.

This appeal arises from the Board of Review's Final Order dated October 3, 2011, in which the Board reversed a June 8, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's August 6, 2010, decision denying an application to reopen the claim for temporary total disability benefits. 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 that the Board of Review's decision is based upon a material misstatement or mischaracterization of the evidentiary record. This case satisfies the "limited circumstances" requirement of Rule 21(d) of the Revised Rules of Appellate Procedure and is appropriate for a memorandum decision rather than an opinion.

Mr. Mounts was working for Preston Memorial Hospital Corporation when he injured his back on October 3, 2009. The claim was subsequently held compensable for a lumbar strain. On March 27, 2010, Mr. Mounts fell while at work. He applied for workers' compensation benefits for that injury, and the claim was denied. He then filed an application to reopen this claim for temporary total disability benefits, alleging that during his fall he aggravated the compensable

lumbar strain. On August 6, 2010, the claims administrator denied the application to reopen the claim.

The Office of Judges reversed the claims administrator's Order, and granted temporary total disability benefits from March 27, 2010, through June 28, 2010, when Mr. Mounts began a new job. The Board of Review reversed the Office of Judges' Order, and reinstated the claims administrator's August 6, 2010, decision denying the application to reopen the claim. On appeal, Mr. Mounts argues that at the time of the compensable injury he suffered from lumbar radiculopathy, which caused his March 27, 2010, fall and aggravated the compensable injury, and thus he is entitled to temporary total disability and medical benefits. Preston Memorial Hospital maintains that the evidence does not establish that Mr. Mounts suffered an aggravation or progression of the prior injury.

The Board of Review held that the evidence does not establish that there has been a progression or aggravation of the October 3, 2009, compensable injury. We disagree. The Office of Judges noted that Mr. Mounts testified that he experienced low back pain and his leg gave way resulting in a fall while at work. It concluded that the evidence established that Mr. Mounts suffered a progression or aggravation of his compensable lumbar strain on March 27, 2010. Thus, the Office of Judges granted Mr. Mounts's request to reopen the claim, and granted temporary total disability benefits from March 27, 2010, through June 28, 2010. We agree with the reasoning and conclusions of the Office of Judges.

For the foregoing reasons, we find that the decision of the Board of Review is based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is reversed and remanded with instructions to reinstate the June 8, 2011, Office of Judges' Order.

Reversed and Remanded.

**ISSUED: July 15, 2013**

**CONCURRED IN BY:**

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II