

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**THOMAS L. GESSLER, Petitioner**

**December 9, 2011**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**vs.) No. 101279 (BOR Appeal No. 2044352)**  
**(Claim No. 2010107488)**

**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 September 8, 2010, in which the Board reversed a March 24, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the Claims Administrator's October 8, 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 held that the preponderance of the evidence established the claimant did not sustain a compensable injury in the course of and resulting from his employment. Mr. Gessler argues that the new findings on the MRI along with the medical evidence establish that he suffered a compensable injury on August 6, 2009. He contends that waiting six weeks after the accident to file an application for benefits is insignificant.

Consolidation Coal Company points to inconsistencies in the record and evidence of pre-existing symptoms to argue that the Board of Review was correct in finding there was no compensable injury.

In reversing the Office of Judges' Order, the Board of Review found there was objective evidence establishing symptoms and treatment of those symptoms in the lower back and right leg on a regular, ongoing basis prior to the alleged August 6, 2009, incident. (September 8, 2010, Board of Review Order, p. 5). It noted several reports from physicians noting the claimant's lower back and right leg symptoms prior to the alleged injury. *Id.* at p. 3. The Board of Review also noted the lack of medical evidence demonstrating that the progression noted on the MRI was a result of the alleged injury and not of the pre-existing, chronic and severe degenerative changes. *Id.* at p. 5.

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 Board of Review Order of September 8, 2010, is affirmed.

Affirmed.

**ISSUED: December 9, 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