

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 2, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BURL E. BELL, Petitioner

**vs.) No. 11-0297 (BOR Appeal No. 2044884)
(Claim No. 2007218825)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WALSH CONSTRUCTION COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner Burl E. Bell, by Edwin Pancake, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Walsh Construction Company, by Nathaniel Kuratomi, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 19, 2011, in which the Board affirmed a July 23, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's July 21, 2009, decision closing the claim for temporary total disability benefits. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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.

Mr. Bell was employed as a foreman with Walsh Construction Company. On March 14, 2007, he was injured when he was struck by a man bucket, which is a device used to raise and lower employees at construction sites. On February 10, 2009, Dr. Fishbein performed an independent medical evaluation and diagnosed Mr. Bell with a lumbar sprain, neck sprain, and lumbosacral sprain. He found that Mr. Bell has reached maximum medical improvement, and recommended a 37% permanent partial disability award. On June 2, 2009, Dr. Nadar performed an independent medical evaluation and diagnosed Mr. Bell with cervical and lumbosacral strain

with radiculopathy. He also found that Mr. Bell has reached maximum medical improvement, and found that Mr. Bell suffers from a 23% impairment for the lumbar spine and a 20% impairment for the cervical spine. He found that 50% of each recommended award should be attributed to a prior work-related injury.

In its Order affirming the claims administrator's July 21, 2009, decision, the Office of Judges held that Mr. Bell has reached maximum medical improvement and therefore is not entitled to temporary total disability benefits pursuant to West Virginia Code § 23-4-7a(e) (2005). Mr. Bell disputes this finding and asserts that he is entitled to temporary total disability benefits from May 25, 2009, through June 2, 2009, because Dr. Fishbein's February 10, 2009, report finding that Mr. Bell has reached maximum medical improvement is unreliable.

West Virginia Code § 23-4-7a(e) states that temporary total disability benefits will not be paid after a claimant has reached maximum medical improvement, is released to return to work, or has actually returned to work. Both Dr. Fishbein and Dr. Nadar explicitly stated that Mr. Bell has reached maximum medical improvement. The Office of Judges found that there is nothing in the record to contradict the opinions of Dr. Fishbein and Dr. Nadar. Therefore, the record indicates that Mr. Bell has been at maximum medical improvement from the time of Dr. Fishbein's independent medical evaluation. The Board of Review reached the same reasoned conclusions in its decision of January 19, 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: October 2, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum