

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

IRELAND B. FERRELL,
Claimant Below, Petitioner

vs.) No. 100774 (BOR Appeal No. 2043897)
(Claim No. 2008000306)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

WAYCO LIMITED PARTNERSHIP NO. 1,
Employer Below, Respondent

FILED
July 19, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 3, 2010, in which the Board affirmed a November 24, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's May 14, 2008 Order, which ordered a benefit overpayment in the amount of \$4,062.50 on the basis that wages are not reimbursed for routine medical treatment. The appeal was timely filed by the petitioner, and Wayco Limited Partnership No. 1 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, the Court is of the opinion that this case 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 ordering a benefit overpayment. Mr. Ferrell argues that he had surgery related to his compensable condition, and he was off work for a period of time while he recovered from that surgery. He received temporary total disability benefits while recovering. Because surgery is not “routine medical treatment,” Mr. Ferrell argues that the claims administrator wrongly ordered a benefit overpayment. The Office of Judges, however, considered a medical payments summary inquiry, which showed that the contested payments were made for “lost wages.” (Nov. 24, 2009 Office of Judges Order, p. 4.) Pursuant to West Virginia Code § 23-4-8, wage replacement benefits are available only while attending a medical examination that a claimant is ordered to undergo by an employer or the claims administrator. *Id.* Therefore, the Office of Judges found that Mr. Ferrell was not entitled to receive wage replacement benefits during the time that he was also being paid temporary total disability benefits. *Id.* The Board of Review reached the same reasoned conclusion in its decision of June 3, 2010.

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 ordering of a benefit overpayment in the amount of \$4,062.50 is affirmed.

Affirmed.

ISSUED: July 19, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum