

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

EDWARD F. RUDDER,
Claimant Below, Appellant

FILED
May 6, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs:) **No. 35727 (BOR 2043453)**
(Claim No. 200308856)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER, AS
ADMINISTRATOR OF THE WORKERS'
COMPENSATION OLD FUND,
Commissioner Below, Appellee

and

WEST VIRGINIA DIVISION OF JUVENILE SERVICES,
Employer Below, Appellee

AMENDED MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated March 30, 2010, in which the Board reversed a July 21, 2009, Order of the Workers' Compensation's Office of Judges. In its Order, the Office of Judges reversed the Claims Administrator's order of September 19, 2008, that denied the request to reopen the claim on a permanent partial disability basis because it had been more than five years since the initial payment of permanent partial disability. The Insurance Commissioner conceded before the Administrative Law Judge that the appellant had timely filed a petition for reopening, but argued that the appellant failed to establish a *prima facie* cause to support the reopening of the claim for permanent partial disability. The Office of Judges ordered that the claim be reopened, with instructions to refer the appellant for an independent medical examination. The Board of Review reversed and vacated the order of the Office of Judges, finding that the analysis and conclusion of the Administrative Law Judge was clearly wrong in view of the reliable, probative and substantial evidence on the whole record.

The appeal was timely filed by the appellant, and a response was filed by the

Insurance Commissioner as Administrator of the Workers' Compensation Old Fund. The Court has carefully reviewed the record, written arguments and appendices contained in the record, and the case is mature for consideration.

Pursuant to Revised Rule 1(d), this matter should be, and hereby is, set for consideration under the Revised Rules of Appellate Procedure. Having considered the parties' submissions and the relevant decisions of the lower tribunals, the Court is of the opinion that the decisional process would not be significantly aided by oral argument. 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 underlying facts of this appeal are as follows: The appellant suffered a compensable injury on August 5, 2002. He received an award of 23 percent permanent partial disability on August 1, 2003. On August 1, 2008, the appellant petitioned to reopen his claim for additional permanent partial disability. Enclosed with the petition for reopening was the July 31, 2008, report of Edita Milan, M.D., that included a diagnosis of chronic lumbar, right shoulder and right wrist strain. Dr. Milan calculated the appellant's additional whole person impairment by using the range of motion method. He concluded that the claimant had an additional 14 percent impairment over the previously granted 23 percent impairment, for a total of 37 percent whole person impairment due to the compensable conditions.

The issue before this Court is whether the report of Dr. Milan satisfied the requirement that for the purposes of reopening a claim under the provisions of W. Va. Code §§23-5-2 and 23-5-3, the claimant must make application in writing showing a progression or aggravation of the compensable condition or some other fact or facts which were not previously considered which would entitle the claimant to greater benefits that he or she has already received. The Commissioner contends that the Board of Review's order reversing the Office of Judges' order and denying the reopening of the claim was proper because the appellant did not present a *prima facie* cause to support the reopening of the claim for further benefits.

As this Court held in *Harper v. State Workmen's Compensation Commissioner*, 160 W. Va. 364, cause for further adjustments of an award has been interpreted as the showing of a *prima facie* cause which means nothing more than any evidence which would tend to justify, but not compel, the inference that there has been a progression or aggravation of the former injury.

Dr. Milan's report demonstrates a progression or aggravation of the compensable injury by showing that the appellant is unable to bend his back, has restricted range of motion of the neck on the anterior flexion, is unable to lift the right shoulder beyond 90 degrees and cannot do a full squat. The report reflects that the shoulder, neck and back injuries have progressed since the date of injury on August 5, 2002. The order of the Office of Judges was

correct in determining that Dr. Milan's report is sufficient for the limited purpose of reopening the claim on a permanent partial disability basis because it establishes *prima facie* evidence that there is an inference that there has been a progression or aggravation.

For the foregoing reasons, we find that the decision of the Board of Review is 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 denial of the request to reopen the appellant's claim for further consideration of permanent partial disability (PPD) benefits was error, and the order of the West Virginia Workers' Compensation Board of Review dated March 30, 2010, should be, and is hereby REVERSED, and the claim remanded for reinstatement of the order of the Office of Judges dated July 21, 2009.

Reversed and remanded with instructions.

ISSUED: May 6, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

DISSENTED:

Justice Robin Jean Davis would affirm, as there was no evidence submitted of the aggravation of or progression of the injury.