

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER, Petitioner**

June 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101193 (BOR Appeal No. 2044066)
(Claim No. 2004046259)

**JOHN D. EBBERT JR., and CON-WAY
TRANSPORTATION SERVICES, INC., Respondent**

MEMORANDUM DECISION

The West Virginia Office of Insurance Commissioner, by David Stuart, its attorney, appeals the decision of the Board of Review. John D. Ebbert Jr., by M. Jane Glauser, his attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated August 19, 2010, in which the Board affirmed and modified a January 7, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's March 9, 2009, decision denying Mr. Ebbert's request to reopen his claim for further consideration of 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.

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 a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Mr. Ebbert was employed as a truck driver with Con-Way Transportation until June 27, 2006. In 2004, Mr. Ebbert was rear-ended while at work, which resulted in severe injuries to his neck and lower back. On June 27, 2006, he injured his neck and lower back when he hit his head on the roof

of his truck. Mr. Ebbert subsequently petitioned to reopen the claim stemming from the 2004 injury for the consideration of temporary total disability benefits.

In its Order reversing the March 9, 2009, claims administrator's decision, the Office of Judges held that Mr. Ebbert established a prima facie cause to reopen his claim for temporary total disability benefits. Specifically, the Office of Judges found that the claims administrator was incorrect in rejecting Mr. Ebbert's request to reopen on the grounds that he had sustained an intervening injury on June 27, 2006, and that the record establishes that Mr. Ebbert actually aggravated a preexisting compensable injury. The Office of Judges further found that the evidence of record establishes that Mr. Ebbert was disabled and unable to work as a result the June 27, 2006, incident. The Board of Review affirmed the Office of Judges Order and added an instruction stating: "The claims administrator shall reduce the claimant's temporary total disability benefits by the amount of Social Security Disability benefits the claimant was entitled to receive during the same time period." The West Virginia Office of Insurance Commissioner disputes this finding and asserts that Mr. Ebbert did not aggravate a preexisting injury, and that by accepting Social Security Disability benefits he removed himself from the workforce voluntarily and is therefore not entitled to temporary total disability benefits.

In Case No. 101130, this Court affirmed and modified the decision of the Board of Review as the result of an appeal by Mr. Ebbert. In Case No. 101130, this Court noted that in *Bevins v. West Virginia Office of Ins. Com'r*, 227 W.Va. 315, 328, 708 S.E.2d 509, 522 (2010), this Court held that a claimant may receive temporary total disability benefits and Social Security Disability benefits simultaneously for the same compensable injury. This Court further held that 42 U. S. C. § 424a (2006) operates to prevent a windfall by reducing the amount of Social Security Disability benefits when an employee also receives workers' compensation benefits. *Id.* at 523.

Therefore, the decision of the Board of Review is affirmed insofar as Mr. Ebbert is entitled to a reopening of the claim for further consideration of temporary total disability benefits and modified to reflect that any remittance shall occur in accordance with the provisions set forth in 42 U. S. C. § 424a (2006).

Affirmed.

ISSUED: June 14, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh