

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

January 14, 2014

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

JEFFREY M. WARD,
Claimant Below, Petitioner

vs.) **No. 12-0738** (BOR Appeal No. 2046589)
(Claim No. 2009062516)

M & G POLYMERS USA, LLC,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Jeffrey M. Ward, by Edwin H. Pancake, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. M & G Polymers USA, LLC, by Jeffrey B. Brannon, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 18, 2012, in which the Board modified an October 25, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's June 25, 2010, decision closing the claim for temporary total disability benefits and a December 15, 2010, decision rejecting Mr. Ward's application for workers' compensation benefits. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Ward was working as a general operator for M & G Polymers USA, LLC on September 30, 2008, when he allegedly suffered a sprain/strain injury to his back as he was lifting a large lid on a dust collector. Mr. Ward immediately reported this injury to his supervisor but did not require immediate medical attention and continued working. The claims administrator authorized an MRI, an EMG, referral to Dr. Mehta for an epidural consultation, and a functional capacity evaluation before ever holding the claim compensable on July 21,

2010, for a low back strain. On June 25, 2010, the claims administrator closed the claim for temporary total disability benefits. On December 15, 2010, the claims administrator rejected Mr. Ward's application for workers' compensation benefits and held that according to West Virginia Code of State Rules § 85-20-1.12 (2006), all benefits paid in this claim to date are overpayments as this claim was not timely filed.

The Office of Judges affirmed the claims administrator's decision and held that Mr. Ward did not file the claim within the time period required by West Virginia Code § 23-4-15(a) (2010) and that the closure of temporary total disability benefits is essentially moot since the claim has now been rejected. The Board of Review modified the Office of Judges' Order to reflect that the claims administrator's declaration of overpayment is vacated and prohibited the claims administrator from declaring that the benefits paid in this claim are overpayments. Mr. Ward disagrees and asserts that his not filing within six months was a mere technicality and he believed that he had done all that was necessary, which is supported by the claims administrator's numerous decisions granting benefits. M & G Polymers USA, LLC maintains that Mr. Ward did not file a workers' compensation claim with the claims administrator within six months of the date of his injury as is required by West Virginia Code § 23-4-15(a) and therefore, the claim should be denied compensability.

The Board of Review agreed with the Office of Judges' conclusion that Mr. Ward did not file a claim within the time period required. West Virginia Code § 23-4-15(a) states that for an employee to be entitled to compensation the application for an injury must be completed and filed with the Insurance Commissioner, private carrier, or self-insured employer within six months of the date of injury and if it is not filed within the six months then the claim is barred forever. West Virginia Code § 23-4-15(a) further states that the time limitation is a condition of the right and hence jurisdictional. Mr. Ward was injured on September 30, 2008, but the Employees' and Physicians' Report of Occupational Injury form was not completed by the physician until November 5, 2009. Therefore, Mr. Ward clearly did not file his claim within six months of the injury. The Office of Judges determined that there was no exception to the time limitation requirements of West Virginia Code § 23-4-15(a), and the Board of Review affirmed this conclusion.

The Board of Review reasoned that the Office of Judges' conclusion to affirm the declaration of overpayments was clearly wrong in view of the reliable, probative, and substantial evidence on the record. The claims administrator issued decisions authorizing testing, treatment, a functional capacity evaluation, and an independent medical evaluation since on or about March 15, 2010. The claims administrator also granted Mr. Ward temporary total disability benefits. On July 21, 2010, the claims administrator held the claim compensable for low back strain but then issued a "corrected order" rejecting the claim on December 15, 2010. The Board of Review determined that Mr. Ward relied to his detriment on the claims administrator's decisions approving benefits and reasoned that Mr. Ward would not have undertaken the testing, treatment, and evaluations if the claims administrator had not authorized the procedures and treatment. The Board of Review modified the Office of Judges' Order and vacated the claims administrator's declaration of overpayment. 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: January 14, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis
Justice Margaret L. Workman
Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum

Justice Brent D. Benjamin, Not Participating