

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

MY 29, 2012

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

DAVID DEMPEWOLF, Petitioner

**vs.) No. 100671 (BOR Appeal No. 2043644)
(Claim No. 2003006862)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
PPG INDUSTRIES, INC., Respondent**

MEMORANDUM DECISION

Petitioner David Dempewolf, by Jonathan Bowman, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order denying the requested medical benefits. PPG Industries, Inc., by Gary Nickerson, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated April 22, 2010, in which the Board affirmed a September 30, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 23, 2009, denial of the requested neck surgery. 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 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.

In this case, Mr. Dempewolf was a laborer for PPG Industries, Inc. On July 19, 2002, he suffered a neck strain while at work. The claims administrator denied a request for an anterior cervical disc fusion of the C3-C4 on February 23, 2009.

The Office of Judges held that the requested neck surgery was not medically related to the compensable injury in this claim. Mr. Dempewolf disagrees and asserts that all previous cervical injuries have been work-related and the compensable injury in this claim aggravated his condition, making the surgery necessary.

In affirming the claims administrator's denial of the neck surgery, the Office of Judges noted that Mr. Dempewolf had a documented history of neck difficulties, including degenerative disc disease. The Office of Judges also noted that the compensable injury in this claim has been documented as minor with no impairment attributable. The Office of Judges found that the preponderance of the evidence did not support a finding that the surgery is medically related and reasonably required for the treatment of the compensable injury. The Board of Review reached the same reasoned conclusion in its decision of April 22, 2010.

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 Board of Review's April 22, 2010, Order is affirmed.

Affirmed.

ISSUED: May 29, 2012

CONCURRED IN BY:

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

Justice Brent D. Benjamin