

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FRANCO B. TORINI,
Claimant Below, Petitioner

vs.) No. 100888 (BOR Appeal No. 2043793)
(Claim No. 2008038116)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

BALL AEROSOL & SPECIALTY
CONTAINER, INC.,
Employer Below, Respondent

FILED

July 29, 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 14, 2010, in which the Board reversed in part and affirmed in part a November 4, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's July 28, 2008 Order, which denied Mr. Torini's request for temporary total disability benefits. The Board reversed only this aspect of the Office of Judges's Order. The Office of Judges's November 4, 2009 Order also affirmed the claims administrator's October 8, 2008 Order denying treatment of L2, L3, L4, and L5 laminectomies and bilateral foraminotomies and the claims administrator's September 18, 2008 Order denying the condition of acute radiculitis of the right leg as a compensable component. The appeal was timely filed by the petitioner, and Ball Aerosol & Specialty Container, Inc. 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 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 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 reversed the Office of Judge's Order, which granted Mr. Torini's request for temporary total disability benefits beginning July 15, 2008 and ending June 5, 2009. Mr. Torini argues, in short, that there is ample evidence that his compensable injury aggravated his latent herniations so as to necessitate the temporary total disability benefits, requested surgery, and additional component.

In reversing the Office of Judges, the Board of Review noted that Mr. Torini's sole compensable condition is lumbar sprain / strain. (June 14, 2010 Board of Review Order, p.2.) It also highlighted Mr. Torini's preexisting herniated discs and degenerative disc disease. *Id.* Finally, the pain Mr. Torini has that radiates into his right leg is also a complaint that predated the compensable injury. *Id.* The Board concluded that Mr. Torini's well-documented preexisting non-compensable components are the cause of his current condition. *Id.* at p. 3. Therefore, the Board of Review reinstated the claims administrator's order denying his request for temporary total disability benefits. *Id.* at p. 3.

The Board of Review also affirmed the denial of Mr. Torini's request to add acute radiculitis right leg as a compensable component and his request for authorization of laminectomies and bilateral foraminotomies. The Office of Judges began by noting that the only compensable component of Mr. Torini's claim is a lumbar sprain / strain. (Nov. 4, 2009 Office of Judges Order, p. 9.) Dr. Chris Martin, who performed an independent medical evaluation, stated that the proposed surgery is a very extensive decompression to treat spinal stenosis, which no authoritative body regards as a work-related condition. *Id.* Dr. Martin further noted that "there is both a congenital component in the sense that he was born with a relatively narrow spinal canal and a super-imposed age related effect meaning that with time there has been further encroachment on an already narrow spinal canal which may result in symptoms." *Id.* Finding that the requested surgery is not for an injury or disease received in the course of or as a result of his employment, the Office of Judges affirmed the denial of Mr. Torini's request for the proposed surgery. *Id.*

Regarding the request to add acute radiculitis as a compensable component, the Office of Judges noted that Mr. Torini's x-rays taken the day after his compensable injury revealed degenerative changes. *Id.* at p. 10. Mr. Torini's medical records also reveal a history of herniated lumbar discs and pain that radiated into his right leg, which predated the compensable injury. *Id.* at pps. 10-11. Finally, Dr. Martin's report indicated that, had Mr. Torini developed an acute herniated disc during his compensable injury, he would have reported radiation of pain into his legs immediately. *Id.* at p. 11. Mr. Torini did not report this symptom until several weeks after his injury, however. *Id.* Consequently, the Office of Judges found that this condition was not sustained in the course of and as a result of his

employment. *Id.* at p. 12. The Board of Review reached the same reasoned conclusions in affirming the Office of Judges regarding the requested additional component and surgery in its decision of June 14, 2010.

For the foregoing reasons, we find that the decision of the Board of Review regarding the requested temporary total disability benefits is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. Therefore, the denial of petitioner's request for temporary total disability benefits is affirmed.

Additionally, we find that the decision of the Board of Review regarding the additional compensable component and surgery 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 denial of the Mr. Torini's request for authorization of L2, L3, L4, and L5 laminectomies and bilateral foraminotomies and denial of his request to add acute radiculitis right leg as a compensable component are affirmed.

Affirmed.

ISSUED: July 29, 2011

CONCURRED IN BY:

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Margaret Workman

Justice Menis E. Ketchum