

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

SWVA, INC.,
Employer Below, Petitioner

vs.) No. 100988 (BOR Appeal No. 2044168)
(Claim No. 2008029318)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

DANIEL BOONE,
Claimant 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 July 7, 2010, in which the Board affirmed a February 1, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's February 5, 2009 Order, which denied a reopening of Mr. Boone's claim on a temporary total disability basis. The appeal was timely filed by the petitioner. 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 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.

The Board of Review affirmed the Office of Judge's Order, which granted Mr. Boone temporary total disability benefits from January 2, 2009 through March 2, 2009. SWVA, Inc. argues that the injury for which Mr. Boone was off work was not due to his compensable

injury. Rather, it was an independent intervening injury during a hog hunting trip for which he is not entitled to temporary total disability benefits. SWVA, Inc. also argues that Claimant would have been at work on the date of the new injury had he not been placed on temporary leave due to a positive marijuana drug screen.

In reversing the claims administrator, the Office of Judges found that Mr. Boone's hog hunting trip was nothing more than "a simple walk which would not ordinarily be questioned as a separate injury." (Feb. 1, 2010 Office of Judges Order, p. 7.) "If a worker's compensation claimant shows that he received an initial injury which arose out of and in the course of his employment, then every normal consequence that flows from the injury likewise arises out of the employment. If, however, a subsequent aggravation of the initial injury arises from an independent intervening cause not attributable to the claimant's customary activity in light of his condition, then such aggravation is not compensable." Syl. pt. 4, *Wilson v. Workers' Comp. Comm'r*, 174 W. Va. 611, 328 S.E.2d 485 (1984). Indeed, although Mr. Boone intended to hunt, he had only walked 50 to 60 yards before he asked his friend to take him back home due to back pain. (Feb. 1, 2010 Office of Judges Order, p. 7.) This activity is no different from the trips to the store that he takes. *Id.*

The Office of Judges also found SWVA, Inc.'s statement that Mr. Boone would have been at work on the day of his hog hunting trip save for the positive marijuana screen to be irrelevant. *Id.* Given Mr. Boone's propensities for injury exacerbation from walking, the Office of Judges found it to be "as likely as not that even had the claimant been working and done some excess walking that he would have suffered an exacerbation of his back injury." *Id.* Therefore, the Office of Judges granted temporary total disability benefits, and the Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its July 7, 2010 decision.

For the foregoing reasons, we find that the decision of the Board of Review 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 grant of temporary total disability benefits from January 2, 2009 through March 2, 2009 is affirmed.

Affirmed.

ISSUED: July 29, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Menis E. Ketchum

Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin