

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

November 7, 2012

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

MARVIN THOMPSON, Petitioner

**vs.) No. 11-0338 (BOR Appeal No. 2044967)
(Claim No. 2005037270)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ARGUS ENERGY, LLC, Respondent**

MEMORANDUM DECISION

Petitioner Marvin Thompson, by John Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Jon Snyder, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 26, 2011, in which the Board affirmed an August 26, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 30, 2010, decision denying the compensability of disc herniation. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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. 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.

Mr. Thompson injured his lumbar spine and knees on March 14, 2005, while working as an underground coal miner. On July 14, 2005, Dr. Narra interpreted an MRI of Mr. Thompson's lumbar spine, and diagnosed him with dehydrated discs at L4-S1 with a mild degree of broad-based central and posterior disc herniation at L5-S1. On November 30, 2005, Dr. Weinsweig performed a neurosurgical consultation. He reviewed the July 15, 2005, MRI and diagnosed Mr. Thompson with degenerative disc disease with desiccation at L4-5 and L5-S1; Dr. Weinsweig also noted some disc protrusion at L5-S1 that was not overly severe. He stated that he cannot fully explain Mr. Thompson's continued pain based on the MRI, other than to attribute it to

degenerative disease. On October 19, 2009, Dr. Nadar, Mr. Thompson's treating physician, requested that disc herniation be added as a compensable component of the claim.

In its Order affirming the March 30, 2010, claims administrator's decision, the Office of Judges held that the preponderance of the evidence indicates that disc herniation should not be added as a compensable component. Mr. Thompson disputes this finding, and asserts that the preponderance of the evidence supports a finding that disc herniation should be added as a compensable component.

The Office of Judges found that there is insufficient evidence to support the conclusion that Mr. Thompson sustained a disc herniation that is related to the March 14, 2005, compensable injury. However, the lumbar spine MRI performed shortly after the March 14, 2005, injury revealed a disc herniation at L5-S1. Despite later opinions that Mr. Thompson is suffering from degenerative disc disease only, the evidence of record indicates that he sustained a disc herniation in the course of his employment on March 14, 2005.

For the foregoing reasons, we find that the decision of the Board of Review is based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is reversed and the claim is held compensable for disc herniation at L5-S1.

Reversed and Remanded.

ISSUED: November 7, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Brent D. Benjamin

Justice Margaret L. Workman

DISSENTING:

Justice Robin J. Davis

Justice Thomas E. McHugh