

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 17, 2012

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

JOHN J. LINSKY, Petitioner

vs.) No. 11-0358 (BOR Appeal No. 2044944)
(Claim No. 2009078620)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ALEX ENERGY, INC., Respondent**

MEMORANDUM DECISION

Petitioner John J. Linsky, by Stephen P. New, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Alex Energy, Inc., by Sean Harter, 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 a July 27, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's Order rejecting the claim. 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. 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.

Mr. Linsky was employed as a dozer operator with Alex Energy. On January 22, 2009, he was in an accident at work, for which he was eventually terminated from his job. He denied treatment, as well as the existence of an injury on the night of the accident, only seeking treatment five days later after being terminated. Mr. Linsky visited two different physicians within hours of being terminated. At each physician's office, he described different injury dates and different symptoms and received pharmaceutical prescriptions from each. Three months prior to the alleged injury, Mr. Linsky stated to a treating physician that he felt he was possibly addicted to pain medication.

In its Order, the Office of Judges held that Mr. Linsky failed to establish that he sustained a compensable injury in the course of and resulting from his employment on January 22, 2009. The Office of Judges found that Mr. Linsky failed to give immediate notice of his alleged injury to his employer, as required by West Virginia Code of State Rules § 85–20–1, *et. seq.* (2006) and West Virginia Code § 23–4–1g (2003). The Office of Judges further found that Mr. Linsky’s conflicting statements regarding the date and extent of his alleged injury suggest that claimant did not sustain an occupational injury on January 22, 2009. The Board of Review reached the same reasoned conclusion in its decision of July 27, 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 decision of the Board of Review is affirmed.

Affirmed.

ISSUED: October 17, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

Justice Brent D. Benjamin disqualified.