

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

November 19, 2012

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

KENDELL J. WILSON, Petitioner

vs.) No. 11-0454 (BOR Appeal No. 2045028)
(Claim No. 2009054396)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
SIMONTON BUILDING PRODUCTS,
INC., Respondent**

MEMORANDUM DECISION

Petitioner Kendell J. Wilson, by George Zivkovich, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Simonton Building Products, Inc., by H. Dill Battle, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 25, 2011, in which the Board affirmed a September 9, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's six orders closing the claim for temporary total disability benefits and granting Mr. Wilson an 8% permanent partial disability award; closing the claim for vocational rehabilitation services, denying authorization of a spinal fusion, and compensability of lumbar radiculopathy and disc herniation with myelopathy. 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. Wilson was injured picking up a heavy piece of glass and putting it onto a table at work. The record is not clear as to whether the injury was on August 6, 2008, or May 15, 2008. He has had a history of several reported back injuries going back to 1990. The current injury was held compensable for sprain/strain of pelvic and sprain/strain of lumbar region by order of the

claims administrator in October of 2008. In November of 2008, claimant visited Dr. Crow, a neurosurgeon, who requested authorization for fusion surgery for his spine. In December of 2008, Mr. Wilson visited Dr. Shramowiat, who requested authorization of the same procedures. Dr. Thaxton reviewed both requests and recommended the claims administrator not pay for the fusion, because it was for a degenerative condition and not for the compensable injuries. In January of 2009, Dr. Short conducted an osteopathic manipulative medicine review and opined that the requested fusion treatment was for a preexisting condition unrelated to the compensable injury. The claims administrator denied the requests made by Drs. Crow and Shramowiat.

Dr. Guberman examined Mr. Wilson in March of 2009 and reported that claimant had reached maximum medical improvement for the compensable injury. After examining Mr. Wilson and consulting the chart at West Virginia Code of State Rules § 85-20-C, Dr. Guberman found that Mr. Wilson had an 8% whole person permanent impairment. In April of 2009, Dr. Shramowiat requested two bilateral lumbar paravertebral trigger point injections. Following another osteopathic manipulative medicine review in May of 2009, Dr. Short recommended that prior authorization be required for future procedures in the claim, due to documentation that Dr. Crow had requested authorization for a degenerative condition, as well as the discrepancy between the August 4, 2008, and May 15, 2008, injury dates.

In six different orders, the claims administrator closed the claim for temporary total disability benefits, awarded 8% permanent partial disability award, closed the claim for rehabilitation services, and denied requests to add lumbar radiculopathy and lumbar disc herniation with myelopathy to the compensable medical conditions, as well as a request for fusion. The Office of Judges looked at each order and determined that the preponderance of the evidence supports affirming the claims administrator. The Office of Judges discussed that Mr. Wilson relied on the testimony of Dr. Shramowiat in support of his positions, but that reports by Drs. Bachwitt, Crow, Thaxton, and Guberman support the employer's position. Upon a weighing of the evidence, the Office of Judges found for the employer and closed the claim for temporary total disability benefits and vocational rehabilitation services. The Office of Judges also denied authorization for lumbar radiculopathy and disc herniation with myelopathy, and granted claimant an 8% permanent partial disability impairment award. The Board of Review reached the same reasoned conclusion in its February 25, 2011, Order.

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: November 19, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum