

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 5, 2012

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

JAMES J. CAMPBELL, Petitioner

vs.) No. 11-0611 (BOR Appeal No. 2044881)
(Claim No. 2009082122)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
SEVERSTAL WHEELING, INC., Respondent**

MEMORANDUM DECISION

Petitioner James J. Campbell, by William Gallagher, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Severstal Wheeling, Inc., by Lucinda Fluharty¹, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 8, 2011, in which the Board reversed a July 30, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's April 3, 2009, decision denying a request to add annular tear and radiculopathy as compensable components. 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. Campbell worked for Severstal Wheeling, Inc. when he injured his lower back. The claim was held compensable for a lumbar strain and he was treated for the injury. On April 3, 2009, the claims administrator denied a request to add annular tear and radiculopathy as compensable components in the claim.

¹ On October 3, 2012, Ms. Fluharty withdrew from the representation of Severstal Wheeling, Inc.

The Office of Judges reversed the claims administrator's Order and held that the conditions were compensable elements of the compensable injury. The Board of Review reversed the Office of Judges' Order and reinstated the claims administrator's decision to deny the additional compensable components. On appeal, Mr. Campbell argues that the evidence supports a finding that annular tear and radiculopathy occurred when the compensable injury aggravated a preexisting condition, and these conditions should be compensable components in the claim. Severstal Wheeling maintains that the Board of Review was correct, and that the degenerative changes causing Mr. Campbell's current symptoms were not compensable.

Dr. Grady found that Mr. Campbell did suffer from degenerative changes, but noted it would be hard to say whether those changes preexisted the compensable injury as Mr. Campbell had been asymptomatic until the injury. Further, Dr. Whiting found degenerative changes preexisted the original injury, but did not discuss whether the compensable injury aggravated such changes in his report of January 14, 2010. We agree with the Office of Judges' conclusion that the issue of whether the requested components are the result of an exacerbation of a preexisting condition was not addressed by Dr. Whiting nor Dr. Grady. Dr. Mascio found that the mechanics of the compensable injury could cause a flare of Mr. Campbell's preexisting arthritic changes, and concluded that this did happen based upon Mr. Campbell's lack of symptoms prior to the compensable injury.

For the foregoing reasons, we find that the decision of the Board of Review is clearly based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is reversed and remanded with the instruction to reinstate the Office of Judges July 30, 2010, Order.

Reversed and Remanded.

ISSUED: December 5, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh