

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

KENNETH SMITH,
Claimant Below, Petitioner

FILED
March 27, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 11-0955** (BOR Appeal No. 2045523)
(Claim No. 2010117764)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER**
Commissioner Below, Respondent

and

THOMAS W. BROWN, D/B/A THOMAS BROWN CONTRACTING,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Kenneth Smith, by Sue Anne Howard, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Thomas Brown, by Margaret Hock, his attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 24, 2011, in which the Board affirmed a January 11, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges modified the claims administrator's November 24, 2009, decision and granted Mr. Smith temporary total disability benefits from November 24, 2009, through May 10, 2010. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Smith was working for Thomas Brown Contracting when he injured his lower back. On September 22, 2009, the claim was held compensable for lumbar sprain/strain. On November 24, 2009, the claims administrator issued a decision suspending workers' compensation benefits.

The Office of Judges modified the claims administrator's Order, and granted temporary total disability benefits from November 24, 2009, through May 10, 2010. The Office of Judges noted that denying further treatment other than conservative modalities was supported by the evidence, including a discrepancy between the MRI findings of the radiologist, and Dr. Bejjani's interpretation of the same findings. The Office of Judges found that the evidence demonstrated that Mr. Smith remained temporarily and totally disabled until Dr. Kramer's May 10, 2010, evaluation. Dr. Kramer at that time found that the treatment until that date had been appropriate, and that Mr. Smith had reached maximum medical improvement. Under West Virginia Code § 23-4-7a (2005), temporary total disability benefits are suspended at the earliest of: (a) information that the claimant has reached his/her maximum degree of medical improvement; or (b) has been released to return to work; or (c) has actually returned to work. The Office of Judges was correct to modify the claims administrator's Order to provide temporary total disability benefits until Mr. Smith reached maximum medical improvement. The Board of Review reached the same reasoned conclusions in its decision of May 24, 2011. We agree with the reasoning and conclusions of the Board of Review.

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: March 27, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II