

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

April 19, 2013

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

**ALADDIN SIGNS, INC.,
Employer Below, Petitioner**

vs.) No. 11-1029 (BOR Appeal No. 2045447)
(Claim No. 2010130536)

**FRANK JEFF BERTRAND,
Claimant Below, Respondent**

MEMORANDUM DECISION

Petitioner Aladdin Signs, Inc., by Jeffrey Brannon, its attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Frank Bertrand, by Sue Anne Howard, his attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated June 10, 2011, in which the Board affirmed a December 28, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August 30, 2010, decision holding the claim compensable and granting eight weeks of temporary total disability benefits. The Office of Judges also reversed the claims administrator's September 10, 2010, decision denying a request for additional temporary total disability benefits. 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. Bertrand was working for Aladdin Signs when he injured his lower back lifting a steel cage. The claim was held compensable for a low back sprain/strain, and on August 30, 2010, the claims administrator granted Mr. Bertrand eight weeks of temporary total disability benefits. On September 10, 2010, the claims administrator denied a request for additional temporary total disability benefits.

The Office of Judges reversed the claims administrator's September 10, 2010, decision and granted Mr. Bertrand temporary total disability benefits through September 24, 2010, the date of an independent medical evaluation by Dr. Hennessey. On appeal, Aladdin Signs argues that there was insufficient evidence to award Mr. Bertrand additional temporary total disability benefits outside the guidelines of West Virginia Code of State Rules § 85-20 (2006). On September 24, 2010, Dr. Hennessey evaluated Mr. Bertrand and found no evidence of a residual lumbar strain, and that he was able to return to work with temporary restriction to light duty.

The Office of Judges concluded that the medical evidence of record established that Mr. Bertrand was entitled to temporary total disability benefits through September 24, 2010. 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 noted that the medical evidence in this case is problematic due to gaps in treatment by the treating physician, Dr. Kovalick. However, the Office of Judges found that Dr. Hennessey's September 24, 2010, report established that Mr. Bertrand had reached maximum medical improvement, and was released to return to work. It noted that no evidence established that Mr. Bertrand had reached maximum medical improvement, had been released to return to work, or returned to work prior to the date of Dr. Hennessey's evaluation. Thus, Mr. Bertrand is entitled to temporary total disability benefits through September 24, 2010. The Board of Review reached the same reasoned conclusions in its June 10, 2011, Order. 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: April 19, 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