

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

May 8, 2013

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

**WILLIAM R. METZ JR.,
Claimant Below, Petitioner**

vs.) No. 11-1065 (BOR Appeal No. 2045448)
(Claim No. 2010105837)

**AMERICAN PLATE GLASS, INCORPORATED,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner William R. Metz Jr., by Jonathan C. Bowman, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. American Plate Glass, Incorporated, by Lucinda Fluharty, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated June 21, 2011, in which the Board affirmed a December 2, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 2, 2009, decision denying Mr. Metz's application for workers' compensation 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. Metz asserts a cervical, thoracic, and lumbar spine injury as a result of "lifting" on July 16, 2009, in the course of his job responsibilities as a "journeyman glazer" for American Plate Glass. On October 2, 2009, the claims administrator denied the claim because the injury was not work-related and Mr. Metz's medical history revealed that he did not suffer "a new acute injury" on July 16, 2009, but that his current complaints resulted from preexisting non-occupational fibromyalgia and degenerative, age-related disease.

The Office of Judges held that the record failed to establish a credible preponderant evidentiary foundation to warrant a conclusion that Mr. Metz incurred an injury and/or occupational disease in the course of or resulting from his employment on July 16, 2009. On appeal, Mr. Metz disagrees and asserts that the Office of Judges did not properly follow West Virginia Code § 23-4-1g (2003) in that where equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution most consistent with the claimant's position should be adopted. American Plate Glass maintains that Mr. Metz could not identify any event at work on July 16, 2009, that caused him to have a specific and identifiable, acute pain in any part of his body, that in order to assert an occupational injury there must be an injury in course of and as a result of employment, and that Mr. Metz's injury is a degenerative disc condition.

Under West Virginia Code § 23-4-1 (2008), an employee who receives an injury in the course of and as a result of his or her covered employment is entitled to receive workers' compensation benefits. An employee who is injured gradually by reason of duties of employment and eventually becomes disabled is, under workers' compensation law, no less the recipient of a personal injury than one who suffered single disabling trauma. *Lilly v. State Workmen's Compensation Commissioner*, 159 W. Va. 613 (1976). The Office of Judges noted that the record lacked a sufficient factual foundation for a reasoned determination on whether Mr. Metz's application for benefits could or should properly be designated as a petition to reopen the earlier claim number, 96-53229. The Office of Judges stated that Mr. Metz asserts that his current condition is the result of repetitive lifting with the chargeable employer, and the only direct medical evidence on this issue is: 1) the medical record review completed by Dr. Victoria Langa on July 14, 2010; and 2) the short two-paragraph narrative from Mr. Metz's primary care physician, Dr. Steven Mills, dated December 7, 2009. Dr. Langa opines that Mr. Metz's fifteen to twenty year history of diffuse spinal symptomology was not work-related, but rather a result of age-related progressive degenerative joint and disc disease. Dr. Mills believes that Mr. Metz's work history was a "contributing factor to this condition" based on his job description and repetitive job tasks which would produce the end result of Mr. Metz's spinal deterioration. The Office of Judges noted that the record fails to provide a credible evidentiary foundation either establishing that Mr. Metz's current condition is a progression of a viable and earlier workers' compensation claim or establishing that Mr. Metz's current condition is a result of an occupational disease. The Board of Review reached the same reasoned conclusions in its decision of June 21, 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: May 8, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum