

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

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

FILED
January 14, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 12-0733 (BOR Appeal No. 2046499)
(Claim No. 2001051988)

**SCOTT D. SMITH
Claimant Below, Respondent**

and

**STONEWALL CONSTRUCTION, LLC,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner the West Virginia Office of Insurance Commissioner, by Anna L. Faulkner, its attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Scott D. Smith, by Robert L. Stultz, his attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 21, 2012, in which the Board affirmed a September 13, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's October 19, 2010, decision denying a request for an L5-S1 fusion. 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 worked for Stonewall Construction, LLC, as a construction worker and supervisor. On April 18, 2001, Mr. Smith injured his lower back while lifting panels into a truck. The claims administrator held the claim compensable for a lumbar sprain. As a result of the injury, Mr. Smith underwent a significant course of treatment, including a lumbar laminectomy at L4-5 and a discectomy on the left at L4-5. Following the surgery, Mr. Smith received conservative treatment and physical therapy but he continued to complain of severe pain in his back and down his left leg. Dr. Thrush then evaluated Mr. Smith and found that he had not reached the maximum degree of medical improvement. Dr. Thrush believed there was a causal relationship between Mr. Smith's current symptoms and his compensable injury. Based on Dr. Thrush's recommendation, an MRI was taken of Mr. Smith's lumbar spine which revealed a small disc herniation at the L5-S1 level. The MRI also showed that there was degenerative disc disease at the L4-5 and L5-S1 levels. Dr. Rhodes then requested authorization for an L5-S1 fusion. Mr. Smith's claim was referred to Dr. Bal, who found that the L5-S1 fusion was medically necessary and related to the compensable injury. Dr. Jin then evaluated Mr. Smith's case. Dr. Jin noted that Mr. Smith had a prior back surgery in 1999. Dr. Jin found that Mr. Smith's L5-S1 disc herniation was not related to his compensable injury because it did not appear on earlier scans. On September 13, 2011, the Office of Judges reversed the claims administrator's decision and authorized the L5-S1 fusion. The Board of Review then affirmed the Order of the Office of Judges on March 21, 2012, leading the West Virginia Office of Insurance Commissioner to appeal.

The Office of Judges concluded that the treatment request from Dr. Rhodes for a lumbar fusion was reasonably related to and medically necessary for treatment of Mr. Smith's compensable injury. The Office of Judges found that two of the medical evaluators to which the claims administrator referred Mr. Smith believed that the requested treatment was reasonable. The Office of Judges found that the claims administrator referred Mr. Smith to Dr. Bal and that he had found that an L5-S1 fusion was reasonable and related to the compensable injury. The Office of Judges also found that the independent medical evaluation of Dr. Thrush supported authorizing the procedure. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. The medical evidence in the record consistently shows that the requested L5-S1 fusion is reasonably related and medically necessary to treat Mr. Smith's compensable condition. The reports of Dr. Thrush and Dr. Bal both support authorizing the procedure and their recommendation is supported by the record as a whole. The report of Dr. Jin is not sufficient to rebut the entire weight of the evidence.

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: January 14, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

Justice Brent D. Benjamin, not participating