

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**JAMISON LINVILLE,
Claimant Below, Appellant**

**vs.) No. 35728 (BOR Appeal No. No. 2043494)
(Claim No. 2009090696)**

FILED

June 21, 2011

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

**WEST VIRGINIA OFFICE INSURANCE
COMMISSION and CEMEX, INC.,
Appellees**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review order dated March 30, 2010, in which the Board reversed the Workers' Compensation Office of Judges' order which held the claimant's claim compensable with payment of reasonable medical expenses. The Office of Judges also granted temporary total disability benefits from February 26, 2009, through July 13, 2009, and granted the request for epidural steroid injections. In its order, the Board reinstated the Claims Administrator's order that rejected the claimant's claim. The appeal was timely filed by the claimant. The claimant requests that this Court grant his petition for appeal, reverse the Board's March 30, 2010, order, and reinstate the Office of Judges' order of August 7, 2009.

Pursuant to Revised Rule 1(d), this matter should be, and hereby is, set for consideration under the Revised Rules of Appellate Procedure. Having considered the parties' submissions and the relevant decision of the lower tribunal, this 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.

The appellant, employed by Cemex, Inc., suffered an injury to his back on February 26, 2009, after slipping on a concrete pad while cleaning grease off of it. The Appellant filed an application for workers' compensation benefits, and the claim was held not compensable by the Claims Administrator's order dated May 15, 2009.

It was found by the Administrative Law Judge that the claimant's testimony, the medical evidence of record, and the Claims Administrator's order were all consistent in that they all indicated that the Appellant suffered his injury on February 26, 2009, despite the "employee's and physician's report of injury" of April 2009, having the date noted as

October 21, 2008. In his testimony, the Appellant stated that he signed the report, but did not review it carefully enough to spot the discrepancy. Additionally, the Administrative Law Judge found that the Appellant slipped from the concrete pad, despite the “employee’s and physician’s report of injury” describing the Appellant as having fallen on the concrete pad.

Medical evidence of record shows that the Appellant suffered two herniated discs in his lumbar spine on February 26, 2009, injuries that were not present when he had an MRI administered on November 28, 2008. Dr. Ravindra K. Gogineni indicated in her June 26, 2009, report that bulging annulus were seen on the lumbar spine on both his November 28, 2008, and March 21, 2009, examinations. However, regarding the more recent MRI, Dr. Gogineni stated that there are two small central disc protrusions that were not seen on the previous examination.

Based on the medical evidence of record, this Court finds that the Appellant was injured at work and that the injury is not a new injury, but, rather, an aggravation of a previous non work-related injury. Shane Broomball, the employer’s human resources manager, testified on July 13, 2009, that he had telephone conversations with the Appellant on three separate occasions: March 5, 2009; March 30, 2009; and March 31, 2009. In his testimony, Mr. Broomball stated that the claimant told him that the February 2009 injury at the work site was not a new work-related injury, but rather, was an aggravation of prior back issues, that originally had occurred at home.

The proof required to establish the compensability of a workers’ compensation claim is sufficient evidence to make a reasonable person conclude that the injury occurred while performing the duties of employment. *Ramey v. S.C.C.*, 150 W. Va. 402, 146 S.E.2d 579 (1966). The Appellant satisfied this evidentiary burden by testifying about the incident and submitting medical evidence proving a back injury occurred in the course of employment.

The evidence demonstrates that a compensable injury occurred on February 26, 2009, regardless of whether it is characterized as an aggravation of a pre-existing injury or a new injury, even if the original injury was not work-related. The Office of Judges properly noted that a triggering disabling incident is a covered compensable aggravation of the initial injury, pursuant to the compensability standards established in *Wilson v. W.C.C.*, 174 W. Va. 611, 328 S.E.2d 485 (1984).

According to W. Va. Code § 23-5-15(d), the Board of Review’s order may be reversed if it was based upon the Board’s material mis-statement or mis-characterization of particular components of the evidentiary record. After thorough review of the record, this Court finds that the Board’s order dated March 30, 2010, is clearly erroneous. The Board of Review inappropriately determined that minor discrepancies precluded a workers’ compensation

award. For example, the Board found it compelling that the Appellant had testified that the incident occurred on two separate dates: February 25, 2009, and February 26, 2009. Also, the Board found significant that the Appellant characterized the incident as a “slip” on one form, but as a “fall” on a different form. These factual variances do little to clarify the legal and factual issues in the case *sub judice*. These discrepancies are unimportant: the claimant’s testimony, the Claims Administrator’s order, and the medical evidence all reference February 26, 2009, as the date the claimant slipped on a concrete pad. By ignoring the Appellant’s testimony; the failure of Mr. Brown, the Appellant’s supervisor, to testify; the MRI proving a compensable work injury; as well as focusing on the aforementioned discrepancies; the Board of Review clearly erred by mis-characterizing the evidence relating to the incident.

For the foregoing reasons, the decision of the Board of Review dated March 30, 2010, is reversed, and this matter is remanded to the Board of Review for entry of an order reinstating the Workers’ Compensation Office of Judges’ order dated August 7, 2009, which held the Appellant’s claim compensable with payment of reasonable medical expenses, granted temporary total disability benefits from February 26, 2009, through July 13, 2009, and granted the request for epidural steroid injections.

Reversed and Remanded with directions.

ISSUED: June 21, 2011

CONCURRED IN BY:

Chief Justice Workman
Justice Davis
Justice Benjamin
Justice Ketchum
Justice McHugh