

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

MICHAEL PALMER
Claimant Below, Petitioner

vs.) No. 35753 (BOR Appeal No. 2043405)
(Claim No. 2008043514)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
and AMFM, Inc., Respondents**

FILED
June 22, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated January 25, 2010, in which the Board affirmed an August 6, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's May 20, 2008, Order rejecting the claim. The appeal was timely filed by the petitioner, and a response was filed by the employer. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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, the Court is of the opinion that the decisional process would not be significantly aided by oral argument and that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the decision of the Office of Judges rejecting the claim. Mr. Palmer, a certified nursing assistant, contends that he suffered a compensable back injury on April 14, 2008, as a result of heavy lifting and repetitive bending. In particular, he claims that he experienced pain in his back while repositioning a patient. Mr. Palmer sought medical care after his work shift ended on April 14, 2008, but did not file his worker's compensation claim until approximately one month later. The claims administrator rejected the claim stating that there was conflicting information regarding whether an injury actually occurred. The claims administrator noted that Mr. Palmer's treating physician had initially reported that Mr. Palmer "did not recall any injury to [his back]." (May 20, 2008,

Claims Administrator Order). In upholding the claims administrator's decision, the Office of Judges stated that Mr. Palmer "did not recall any injury to his back, but a month later after an MRI diagnosis of a herniated disc and the prospect of surgery, the doctor reports, 'He now wants to get Workers' Comp.'" (August 6, 2009, Office of Judges Order, p. 4). The Office of Judges concluded that the preponderance of the evidence was against finding the claim compensable. The Board of Review reached the same conclusion and affirmed the Office of Judges' decision.

Upon review of the record, the Court finds that the decision of the Board of Review was based upon an erroneous conclusion of law and a mis-characterization of the evidentiary record. With regard to the evidence, although Mr. Palmer's treating physician initially stated that the claimant did not recall a work injury, he submitted a subsequent report wherein he explained that Mr. Palmer's injury is consistent with his duties as a nursing assistant and that Mr. Palmer had later recalled experiencing pain in his back while repositioning a patient. In addition, the treatment notes of Mr. Palmer's physical therapist indicate that Mr. Palmer told her the day after his injury occurred that he first noticed pain while at work. Finally, an internal incident report completed by Mr. Palmer's supervisor states that the injury was work-related. The Court has held that "[a] claimant in a workmen's compensation case must bear the burden of proving his claim but in doing so it is not necessary to prove to the exclusion of all else the causal connection between the injury and the employment." Syllabus Point 2, *Sowder v. State Workmen's Compensation Commissioner*, 155 W.Va. 889, 189 S.E.2d 674 (1972). Syllabus Point 1, *Myers v. State Workmen's Compensation Comm'r*, 160 W.Va. 766, 239 S.E.2d 124 (1977). Syllabus Point 4, *Wilkinson v. West Virginia Office Ins. Comm'n*, 222 W.Va. 394, 664 S.E.2d 735 (2008). Also, W. Va. Code § 23-4-1g (2003) (Repl. Vol. 2010) states:

If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.

Based upon all the above, the Board of Review erred in concluding that the preponderance of the evidence weighed against finding the claim compensable. At a minimum, there was an equal amount of evidentiary weight on both sides of the compensability issue. Accordingly, the claim should have been held compensable.

For the foregoing reasons, the final order of the Board of Review dated January 25, 2010, is reversed, and this case is remanded to the Board of Review to enter an order holding the claim compensable.

Reversed and remanded.

ISSUED: June 22, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

DISSENTING:

Justice Robin Jean Davis