

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

JONATHAN A. HUGHES, Petitioner

March 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101479 (BOR Appeal No. 2044783)
(Claim No. 2008011484)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
PHYSICAL DISTRIBUTION SERVICES, INC.,
Respondent**

MEMORANDUM DECISION

Petitioner Jonathan A. Hughes, by William Gerwig III, his attorney, appeals the decision of the Board of Review. Physical Distribution Services, Inc., by Nathaniel Kuratomi, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated November 9, 2010, in which the Board affirmed a July 12, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's May 18, 2009, decision denying the compensability of lumbar sprain/strain and unspecified thoracic/lumbar neuritis/radiculitis, and denying authorization for a left L5-S1 lumbar discectomy. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition 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. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. 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.

In its Order, the Office of Judges held that sprain/strain of the lumbar region and unspecified thoracic/lumbar neuritis/radiculitis should not be added as compensable components of the claim, and that a left L5-S1 lumbar discectomy is not reasonable and medically necessary in this claim. Mr.

Hughes disputes this finding and asserts that he injured his back while participating in work conditioning for a compensable knee injury.

The Office of Judges found that Mr. Hughes did not complain of back pain at the time of his injury in September 2007. The Office of Judges further found that Mr. Hughes only reported minimal back pain in December 2007 and January 2008 while participating in work conditioning, and that the pain resolved by the time he completed work conditioning at the heavy physical demand level on February 8, 2008. The Office of Judges noted that Mr. Hughes did not report a specific injury while participating in work conditioning, and that he returned to work with no restrictions on February 18, 2008. The Office of Judges found that Mr. Hughes reported back pain again on July 7, 2008, and again he did not link the pain to a specific injury. The Office of Judges further found that both Dr. Dauphin and Dr. Bachwitt are of the opinion that Mr. Hughes's back pain is not related to his compensable knee injury, and held that he failed to establish a causal connection between his back pain and the compensable knee injury. The Board of Review reached the same reasoned conclusion in its decision of November 9, 2010.

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 the Board's material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: March 26, 2012

CONCURRED IN BY:

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum