

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**BRIAN K. MERRITT,**  
**Claimant Below, Petitioner**

**FILED**  
October 4, 2013  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

vs.) **No. 12-0068** (BOR Appeal No. 204306)  
(Claim No. 2008038066)

**VILLAGE OF BARBOURSVILLE,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Brian K. Merit, by Edwin H. Pancake, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The Village of Barboursville, by Steven K. Wellman, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated December 23, 2011, in which the Board affirmed an August 4, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's May 14, 2010, decision denying a reopening of the claim for temporary total disability benefits, and its December 7, 2010, decision denying a request for a lumbar 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.

On March 27, 2008, Mr. Merritt sustained an injury while lifting in the capacity of his employment for the Village of Barboursville. The claim was held compensable for a lumbar strain/sprain. On September 13, 2008, Dr. Walker concluded Mr. Merritt had reached maximum medical improvement. On May 11, 2010, Dr. Thaxton recommended that Mr. Merritt's current symptoms appear more likely than not to be due to a preexisting condition. On October 27, 2010, Dr. Thaxton concluded that payment for the lumbar fusion surgery would not fall under this claim.

The Office of Judges affirmed the claims administrator's decisions dated May 14, 2010, and December 7, 2010, and held that Mr. Merritt has not sustained an aggravation or progression of a compensable component, nor has he shown facts not previously considered to entitle him to temporary total disability benefits, and that his lower back condition is attributable mostly to preexisting non-compensable degenerative disc problems. On appeal, Mr. Merritt disagrees and asserts that the medical evidence supports a finding that he has suffered an aggravation or progression of his condition which requires surgical treatment, and that the evidence does not support a finding that his degenerative changes are the cause of his disability and need for surgery.

The Office of Judges concluded that Mr. Merritt has a history of back problems that have required multiple emergency room visits, and that the evidence is persuasive that his preexisting condition prompted the recommendation for surgery. Mr. Merritt has a history of degenerative changes as shown on an MRI dated May 5, 2008, and a progression of these degenerative changes is shown on an MRI dated April 13, 2010. The Office of Judges concluded that the degenerative changes are not a compensable condition. The Office of Judges relied on Dr. Walker's recommendation that Mr. Merritt had reached maximum medical improvement, and Dr. Thaxton's recommendation that the current symptoms appear more likely than not to be due to a preexisting condition. Ultimately, the Office of Judges concluded that the weight of the evidence supports a denial of authorization for lumbar fusion and temporary total disability benefits. The Board of Review reached the same reasoned conclusions in its decision of December 23, 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: October 4, 2013**

**CONCURRED IN BY:**

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II