

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**RONALD A. KLUSKEY,  
Claimant Below, Petitioner**

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

vs.) **No. 12-0648** (BOR Appeal No. 2046545)  
(Claim No. 2011022760)

**J. D. MILLER,  
Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Ronald A. Kluskey, by Sue Anne Howard, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. J. D. Miller, by Lucinda Fluharty, his attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 25, 2012, in which the Board affirmed an October 11, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's January 21, 2011, decision rejecting Mr. Kluskey's application for workers' compensation benefits. 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. Kluskey alleges that he injured his left shoulder on October 18, 2010, when he drove over a pothole while working as a truck driver for J. D. Miller. Mr. Kluskey did not seek medical treatment until November 16, 2010, when he was seen by Dr. Irvin, who stated in a treatment note that Mr. Kluskey reported that he was suffering from increasing left shoulder pain that had been developing over time. Mr. Kluskey denied sustaining any type of injury. A left shoulder MRI performed on December 2, 2010, revealed a left rotator cuff tear. On January 17, 2011, Mr. Kluskey completed a Report of Injury alleging that he sustained a left shoulder injury on October 18, 2010. The portion of the form requiring information supplied by a physician was never

completed. On January 21, 2011, the claims administrator rejected Mr. Kluskey's application for workers' compensation benefits. On February 8, 2011, Mr. Kluskey returned to Dr. Irvin for a follow-up visit. Mr. Kluskey reported to Dr. Irvin that he thought he may have injured his arm while manipulating the steering wheel of the truck he drives for his employer. On February 3, 2011, Mr. Kluskey presented at the Ohio Valley Medical Center emergency room and stated that he pulled a muscle in his left shoulder on August 16, 2010. On April 11, 2011, Mr. Kluskey was evaluated by Dr. DeMeo, who stated that Mr. Kluskey reported to him that he injured his left shoulder four months earlier while driving a truck.

In its Order affirming the January 21, 2011, claims administrator's decision, the Office of Judges held that the preponderance of the evidence fails to establish that Mr. Kluskey sustained a left shoulder injury in the course of and resulting from his employment on October 18, 2010. Mr. Kluskey disputes this finding and asserts that the evidence of record establishes that he sustained a left shoulder injury in the course of and resulting from his employment.

West Virginia Code § 23-4-1 (2008) states that in order to receive workers' compensation benefits an employee must demonstrate that he sustained a personal injury in the course of and resulting from his employment. The Office of Judges noted that there are numerous inconsistencies concerning the circumstances surrounding the alleged injury throughout the evidentiary record. Further, the Office of Judges found that the evidence of record does not establish that Mr. Kluskey sustained an injury that is the proximate result of an incident occurring in the course of or resulting from his employment. The Board of Review reached the same reasoned conclusions in its decision of April 25, 2012. 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: 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