

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**EIN MANAGEMENT, LLC – ELF GERALD ALLMAN,
Employer Below, Petitioner**

FILED
March 20, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 12-0997** (BOR Appeal No. 2047035)
(Claim No. 2011037218)

**DAVID SHOFSTAHL,
Claimant Below, Respondent**

MEMORANDUM DECISION

Petitioner EIN Management, LLC – ELF Gerald Allman, by Gary W. Nickerson and James Heslep, its attorneys, appeals the decision of the West Virginia Workers' Compensation Board of Review.

This appeal arises from the Board of Review's Final Order dated July 30, 2012, in which the Board affirmed a March 15, 2012, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's May 20, 2011, decision rejecting David Shofstahl's claim. The Office of Judges held the claim compensable for a low back injury. 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. Shofstahl worked as a laborer and mason foreman for EIN Management. On May 7, 2011, Mr. Shofstahl was lifting a mortar mixer from a truck when he felt a pop in his back. Mr. Shofstahl's account of the injury was supported by a signed statement of his co-worker, Jeffrey Dunbar. Mr. Shofstahl initially sought treatment at Lewis Gale Allegheny Hospital, indicating that he had a prior history of intervertebral disc disease. But Mr. Shofstahl was also seen by Karl D. Smith, M.D., who ordered an MRI, which revealed a disc extrusion at L5-S1 and a disc protrusion at L4-5. Mr. Shofstahl filed an application for workers' compensation benefits based

on this injury. On May 20, 2011, the claims administrator denied Mr. Shofstahl's application. The claims administrator noted that Mr. Shofstahl has a history of back problems dating back to 2004. The claims administrator also pointed out that James Howard Walker, M.D., had seen Mr. Shofstahl in April of 2011 and found degenerative disc disease at L4-5 and L5-S1. But on March 15, 2012, the Office of Judges reversed the claims administrator's decision and found Mr. Shofstahl's claim compensable. The Board of Review then affirmed the Order of the Office of Judges on July 30, 2012, leading EIN Management to appeal.

The Office of Judges concluded that Mr. Shofstahl sustained a compensable injury to his low back. The Office of Judges concluded that Mr. Shofstahl's prior degenerative changes in his low back did not preclude him from filing a successful claim for workers' compensation benefits. The Office of Judges found that Mr. Shofstahl had prior low back problems but that he had continued to work through those complaints until May 7, 2011, when he experienced a new onset of pain while unloading a truck. The Office of Judges found that this incident was confirmed by his co-worker and that the MRI taken soon after the incident revealed the presence of a massive disc extension at L5-S1 and a disc protrusion at L4-5 which had not appeared on previous diagnostic tests. The Office of Judges found that Dr. Smith had believed that his herniated disc was occupationally related and that EIN Management had not refuted any of Mr. Shofstahl's evidence. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the conclusions of the Board of Review and the findings of the Office of Judges. Mr. Shofstahl has presented sufficient evidence to show that he received an injury to his low back in the course of and resulting from his employment. EIN Management has not adequately refuted his account of the injury. Although there is evidence in the record that Mr. Shofstahl has a history of prior degenerative disc disease and lower back injuries, the MRI taken on May 10, 2011, shows that he had a disc extrusion at L5-S1 and a disc protrusion at L4-5 which did not previously appear in his medical records. Mr. Shofstahl's account of his injury is sufficiently consistent and is supported by his co-worker's statement.

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: March 20, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II