

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

NANCY J. COST, Petitioner

October 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 100964 (BOR Appeal No. 2044022)
(Claim No. 2002022338)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WHEELING-PITTSBURGH STEEL CORPORATION,
Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated June 29, 2010, in which the Board affirmed a December 22, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's June 6, 2009, decision denying Ms. Cost's request that scoliotic deformity be added as a compensable condition. 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 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 Ms. Cost's claim was res judicata. Ms. Cost disputes this finding and asserts that a new examination by Dr. Okwonko provides evidence that her pre-existing scoliotic deformity was worsened by surgical treatment of her October 3, 2001, injury. The Office of Judges found that Ms. Cost had failed to present new

evidence for consideration that warranted the compensability of scoliotic deformity/lumbar scoliosis. The Board of Review affirmed the Office of Judges' conclusion scoliotic deformity is not a compensable component of the claim.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of the petitioner's request for the addition of scoliotic deformity as a compensable condition is affirmed.

Affirmed.

ISSUED: October 28, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh