

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 21, 2011

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**CHARLINA SIZEMORE,
Claimant Below, Petitioner**

**vs.) No. 100802 (BOR Appeal No. 2043921)
(Claim No. 2008027961)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent**

and

**RALEIGH GENERAL HOSPITAL,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 2, 2010, in which the Board affirmed an December 11, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's Order granting Ms. Sizemore an award of 4% permanent partial disability for her lumbar strain/sprain. The appeal was timely filed by the petitioner and a response was filed by the Raleigh General Hospital. 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, response, 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.

The Board of Review affirmed the holding that Ms. Sizemore has been fully compensated for her lumbar strain/sprain and the reduction of permanent partial disability based upon pre-existing degenerative changes. Ms. Baker asserts she is entitled to an additional award of 4% permanent partial disability, for a total of 8%, based upon the findings of Dr. Clifford Carlson. Prior to the decision of the Claims Administrator Ms. Sizemore was examined by Dr. Paul Bachwitt who opined Ms. Sizemore suffered a permanent partial disability of 8% with an appropriate reduction to 4% based upon pre-existing disc degenerative changes. Subsequent to Dr. Bachwitt's examination Ms. Sizemore was examined by Dr. Clifford Carlson who also opined Ms. Sizemore suffered an 8% permanent partial disability, however, Dr. Carlson did not apportion the pre-existing disc degenerative changes as Ms. Sizemore was asymptomatic prior to her injury.

The Office of Judges considered the independent medical examinations of Ms. Sizemore and the relevant medical records in affirming the Claims Administrator's award of 4% permanent partial disability. (December 11, 2009 Office of Judges Order, pp. 2-5). In holding that Ms. Sizemore was entitled to the 4% permanent partial disability the Office of Judges considered W. Va. Code § 23-4-9b and determined that the reduction to 4% was appropriate in light of Ms. Sizemore's pre-existing condition. It noted that W.Va. Code § 23-4-9b does not contain a requirement of prior symptoms to apportion impairment ratings. Further, it noted that the apportionment of Dr. Bachwitt was appropriate and found no basis for further award or for disputing the Claims Administrator's findings. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of June 2, 2010.

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 an additional 4% award for impairment is affirmed.

Affirmed.

ISSUED: July 21, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh