

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

DORA F. CLARK, Petitioner

June 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0011 (BOR Appeal No. 2044565)
(Claim No. 2008045373)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
GREENBRIER HOTEL CORPORATION
(FORMERLY CSX HOTELS, INC.), Respondent**

MEMORANDUM DECISION

Petitioner Dora F. Clark, by Patrick Maroney, her attorney, appeals the decision of the Board of Review. The Greenbrier Hotel Corporation, by H. Toney Stroud, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 6, 2010, in which the Board affirmed a May 6, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's November 6, 2008, decision denying Ms. Clark's request for an anterior cervical discectomy fusion at C5-6 and C6-7, and its December 10, 2008, decision rejecting Ms. Clark's claim for workers' compensation benefits. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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.

Ms. Clark is employed as a warewasher with the Greenbrier Hotel Corporation. She asserts that she injured her shoulder on May 25, 2008, while lifting a rug and that she injured her cervical spine on either May 25, 2008, at the same time that she injured her shoulder, or on May 28, 2008, while lifting a container of milk. The only compensable component resulting from either incident

is a shoulder strain/sprain, for which Ms. Clark has received extensive treatment. Ms. Clark now requests that her cervical spine be added as a compensable component of the claim, and that she receive authorization for an anterior cervical discectomy fusion at C5-6 and C6-7.

As noted by the Office of Judges, Ms. Clark has a long history of back and neck problems, beginning with evidence of a disc bulge at C6-7 in an August 21, 2001, cervical spine MRI. The Office of Judges relied primarily on the opinion of Dr. Bachwitt, who found that Ms. Clark's disc herniation, spondylosis, and anterior osteophytes were all preexisting and not work-related. Dr. Bachwitt based this opinion on diagnostic imaging taken four days after the May 25, 2008, injury and his report indicates that the degenerative changes observed could not have occurred within four days. Dr. Bachwitt also noted the presence of a cervical disc bulge in the record predating the May 25, 2008, injury.

The Office of Judges held that the cervical spine should not be added as a compensable component, and that therefore Ms. Clark is not entitled to authorization for an anterior cervical discectomy fusion at C5-6 and C6-7. The Office of Judges further held that the claims administrator properly rejected Claim No. 2009070207 based on a finding that the mechanism of injury listed by Ms. Clark's treating physician was identical to the mechanism of injury listed in the claim for her May 25, 2008, shoulder injury. The Office of Judges found that there was no evidence that Ms. Clark sustained a new injury in Claim No. 2009070207. The Board of Review reached the same reasoned conclusions in its decision of December 6, 2010.

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: June 14, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum