

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

MAHALA KIRBY, Petitioner

vs.) **No. 110653 (BOR Appeal No. 2045113)**
(Claim No. 2009067309)

FILED

June 27, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
GREENBRIER VALLEY MEDICAL CENTER, Respondent**

MEMORANDUM DECISION

Petitioner, Mahala Kirby, by Reginald D. Henry, appeals the Board of Review's order denying the request to add cervical spine disc herniation as a compensable component of her claim and denying medical treatment related to that condition. Greenbrier Valley Medical Center, by Maureen Kowalski, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated March 17, 2011, in which the Board affirmed a September 29, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's February 18, 2010, Order, which denied the request to add cervical spine disc herniation as a compensable component of the claim and denied treatment related to that condition. 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 parties' submissions 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 briefs, and the record presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The March 17, 2011, Board of Review Order affirmed the September 29, 2010, Office of Judges' Order, which concluded that the principles of res judicata preclude consideration of the inclusion of cervical disc herniation, and Ms. Kirby's cervical spine in general, as compensable components of her injury. Reliance on res judicata stems from the Board of Review's September 1, 2010, decision in this claim denying inclusion of thoracic outlet syndrome as a compensable component. The September 1, 2010, decision concluded that, due to a prior right shoulder and cervical injury sustained by Ms. Kirby in Virginia, certain additional conditions, including thoracic outlet syndrome and somatic dysfunction of the upper extremity, cervical spine, should not be added as compensable components in the subject claim.

The doctrine of res judicata is applicable to workers' compensation cases; however, the "doctrine is not rigidly enforced where to do so would defeat the ends of justice." *Hubbard v. Workers' Comp. Comm'r*, 170 W. Va. 572, 577, 295 S.E.2d 659, 665 (1981). Ms. Kirby received an MRI scan of her cervical spine on February 19, 2010, which revealed right disc herniation at C6-C7. Her treating physician, Dr. J. M. Garlitz, evaluated her subsequent to this imaging. Dr. Garlitz diagnosed cervical spine disc herniation and recommended Ms. Kirby receive a neurosurgical consultation. Dr. Garlitz also found that Ms. Kirby's symptoms stemming from her compensable injury progressed to the cervical disc herniation, and he related this progression and herniation to her compensable injury. In short, it is undisputed that Ms. Kirby suffers from cervical disc herniation, and her treating physician has related this condition to her compensable injury.

Exclusion of cervical herniated disc is premised solely on the doctrine of res judicata. As set forth above, it is undisputed that Mr. Kirby suffers from this condition, and the diagnosis was made following the subject compensable injury; accordingly, reliance on res judicata would defeat the ends of justice. Instead, Ms. Kirby's claim should be evaluated to determine whether the cervical disc herniation is properly attributable to the subject compensable injury.

For the foregoing reasons, we find that the decision of the Board of Review is clearly the result of erroneous conclusions of law and based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of Ms. Kirby's request to add cervical herniated disc as a compensable component and denial of request for attendant treatment is reversed. This case is remanded for consideration of herniated disc as an additional compensable component

Reversed and remanded.

ISSUED: **June 27, 2012**

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh