

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

January 14, 2014

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

**MELISSA STEPHEN,
Claimant Below, Petitioner**

vs.) **No. 12-0758** (BOR Appeal No. 2046751)
(Claim No. 2011023542)

**MARY WAGNER,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Melissa Stephen, by Jonathan Bowman, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Mary Wagner, by Marion Ray, her attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 25, 2012, in which the Board reversed a December 15, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's January 31, 2011, decision denying compensability for a neck 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.

Ms. Stephen alleges that she was injured in the course of her employment on December 21, 2010. She testified in a deposition that she kneeled down to retrieve a bag from the bottom rack of a shelf. When she rose back up she hit her head and fell backwards. She testified that she lay on the floor for quite some time until her co-worker, Ms. O'Brian, found her. Ms. O'Brian allegedly told Ms. Stephen that she heard the noise caused by the fall. She also informed her that she had been unconscious for approximately ten minutes. Ms. Stephen testified that she finished her shift that day and did not seek medical treatment until December 28, 2010. She continued to work the rest of the week following her injury, because there were a lot of call offs and she

needed the money. She stated that she reported the incident to her supervisor, Ms. Ensminger. Ms. Ensminger did not offer her a workers' compensation application to fill out. A week later, after Ms. Stephen's family physician, Dr. Shaban Shoshi, took her off of work, she again asked her supervisor if she needed to fill out a workers' compensation form. Ms. Ensminger told Ms. Stephen that she would fill it out for her. Ms. Stephen acknowledged in her deposition that she was aware that the area where the alleged injury happened is covered by a security camera.

Ms. Stephen's medical reports indicate that she has a history of neck pain/strain, headaches, blurred vision, and dizziness. In a medical report by Dr. Shoshi in September of 2005, it was noted that Ms. Stephen complained of blurred vision and headaches. In a report from August of 2006, Dr. Shoshi noted that she had neck pain/strain with muscle spasms on both sides of the trapezius muscle. In a report from September of 2009, Dr. Shoshi noted that Ms. Stephen had been in a car accident. He diagnosed her with neck pain/strain. A report by Dr. Shoshi from September of 2010, indicated that Ms. Stephen was suffering from dizziness from Vicodin.

Ms. Stephen underwent an independent medical evaluation by Dr. Bill Hennessey on July 7, 2011. He stated in his report that he reviewed the surveillance video on three separate occasions. He was unable to see any evidence that Ms. Stephen hit her head. He stated that the motion was so slow that the most that could have happened would have been a non-visible bruise to the back of the head. He noted that her medical records failed to provide any evidence that an injury occurred on December 21, 2010. Dr. Hennessey noted that Ms. Stephen had a history of neck pain and cervical strain. He also noted that Ms. Stephen filled out a work-related injury questionnaire. On that form she indicated that she had never had similar problems in the past.

The claims administrator denied the claim on January 31, 2011. The claims administrator determined that the surveillance video did not corroborate Ms. Stephen's version of the events surrounding the injury. The Office of Judges reversed the decision of the claims administrator in its December 15, 2011, Order. The Office of Judges found that the surveillance video was not reliable evidence. The time and date stamp indicated that the tape had two gaps in coverage. One of the gaps lasted approximately one minute and the other lasted approximately thirty seconds. Because there was no evidence submitted regarding the technical validity of the video the Office of Judges concluded that it did not merit any evidentiary weight. The Office of Judges did note that Ms. Wagner submitted an affidavit by Ms. Ensminger which stated that the video was an accurate portrayal of the events on the day in question. However, the Office of Judges noted that Ms. Ensminger was not present during the incident in question. Because Dr. Hennessey's conclusions relied on his inspection of the surveillance video, his opinion was also deemed to merit no evidentiary weight.

Since the surveillance video was not credible, the Office of Judges concluded that the only credible evidence of record regarding the injury was Ms. Stephen's testimony. She testified that she injured her head and neck in the course of her employment. Though the employer questions the injury, neither party has produced the testimony of Ms. O'Brian who supposedly heard the noise caused by the fall and witnessed Ms. Stephen lying unconscious on the floor.

The Office of Judges found that Ms. Stephen failed to seek medical treatment for the injury for approximately one week. The emergency room report dated one week after the injury does not mention a work-related injury. However, the report does reference a history of neck and head pain present for the past couple of days that was exacerbated the day before while lifting a patient. Dr. Shoshi's reports do reference a work-related injury on December 21, 2010. Though the employer submitted evidence indicating that Ms. Stephen had pre-existing neck and lower back pain, the Office of Judges determined that the presence of cervical or lumbar spine conditions does not mean Ms. Stephen was not injured in the course of her employment. The Office of Judges looked to *Charlton v. SWCC*, 160 W.Va. 664, 236 S.E.2d 241 (1977), and found that aggravations of pre-existing conditions warrant the inclusion of the aggravated pre-existing condition as a compensable element of the injury. Therefore, the Office of Judges reversed the decision of the claims administrator and held that the injury was compensable.

In its May 25, 2012, decision, the Board of Review reversed the Order of the Office of Judges and reinstated the claims administrator's January 31, 2011, decision. The Board of Review found that Ms. Stephen failed to meet the burden of proof to establish that she sustained an injury in the course of her employment. The Board of Review noted that she claimed she was injured on December 21, 2010, but she did not seek medical treatment until December 28, 2010. When she did seek treatment she reported a history of head and neck pain with symptoms for the past couple of days, and she said she lifted a patient the day before and injured herself more. There was no mention in that report that she hit her head. The diagnoses were cervical strain and headache of uncertain cause.

The Board of Review determined that Ms. Stephen's medical reports show a history of neck pain. It found that in March and August of 2006, Dr. Shoshi diagnosed her with neck pain and strain. In September of 2009 his treatment notes indicate she was in a car accident and complained of neck pain. In September of 2010, he noted that she suffered from dizziness from Vicodin, neck pain/sprain, and lower back pain/sprain. The Board of Review found that Dr. Hennessey indicated in his independent medical evaluation that Ms. Stephen had a normal examination of her head, neck, and shoulders. He also indicated that he reviewed the security video and failed to see any evidence that she struck her head. The Board of Review noted that it reviewed the video tape and agreed with Dr. Hennessey.

The reasoning and conclusions of the Board of Review are clearly supported by the evidentiary record. Ms. Stephen suffered from a history of neck pain. She failed to seek medical treatment for her alleged work injury for approximately seven days. When she did seek treatment, she failed to mention that she hit her head or that she had sustained a work-related injury. The work-related injury questionnaire Ms. Stephen filled out on July 7, 2011, indicated that she had no similar problems in the past. This was incorrect because the evidentiary record clearly shows that she has a history of neck pain, headache, blurry vision, and dizziness. Dr. Hennessey reviewed the surveillance video and found that there was no evidence that Ms. Stephen hit her head. His report said that at the speed she was moving, the most that could have occurred would be a non-visible bruise. The evidence therefore supports the Board of Review's determination that Ms. Stephen did not sustain an injury in the course of her employment.

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: January 14, 2014

CONCURRED IN BY:

Chief Justice Robin J. Davis
Justice Menis E. Ketchum
Justice Allen H. Loughry II

DISSENTING:

Justice Margaret L. Workman

Justice Brent D. Benjamin, Not Participating