

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

January 14, 2014

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

**MILDRED E. QUEEN,
Claimant Below, Petitioner**

vs.) **No. 12-0781** (BOR Appeal No. 2046660)
(Claim No. 2005047960)

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

and

**TEKNETIX, INC.,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Mildred E. Queen, by George Zivkovich, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Mark A. Bramble, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated June 8, 2012, in which the Board affirmed, in part, and reversed, in part, a November 10, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's March 31, 2009, decision denying requests to add the conditions intervertebral disc disorder cervical region, intervertebral disc disorder thoracic region, and spinal stenosis cervical region to the claim. 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, on the issue of compensability of intervertebral disc disorder cervical region and spinal stenosis in the cervical region, the Court finds no substantial question of law and no prejudicial error. Regarding the issue of the Board of Review's determination that intervertebral

disc disorder thoracic region is not a compensable component of the claim, the Court finds that the Board of Review's decision is based upon a material misstatement or mischaracterization of the evidentiary record. This case satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure and is appropriate for a memorandum decision rather than an opinion.

Ms. Queen was injured in the course of her employment when she slipped and fell on a wet floor. Her claim was held compensable for headache and sprain/strain of the neck, thoracic, and lumbosacral regions. After the accident, Ms. Queen continued to experience pain in her neck and back. An evaluation by Dr. Houman Khosrovi in November of 2006, revealed that she was suffering from disc spurring in the cervical and thoracic regions. It was Dr. Khosrovi's opinion that the spurring was not caused by her work-related injury. However, the injury did cause the condition to become symptomatic. It was determined that surgery on her cervical spine was necessary. On September 10, 2010, this Court instructed the Board of Review to authorize the surgery. In August of 2007, Dr. Chris Fox, Ms. Queen's chiropractor, requested that the conditions intervertebral disc disorder cervical region, intervertebral disc disorder thoracic region and spinal stenosis cervical region be added to the claim. The claims administrator denied that request on March 31, 2009.

The Office of Judges determined in its November 10, 2011, Order, that the conditions were compensable components of the claim. The Office of Judges stated that its findings were based on this Court's decision instructing the Board of Review to authorize cervical spine surgery. Because this Court ordered treatment for Ms. Queen's cervical spine condition, the Office of Judges concluded that this Court determined the condition was a compensable component of the claim. The Office of Judges noted that this Court did not rule on the compensability of the intervertebral disc disorder thoracic region and spinal stenosis in the cervical region. However, the Office of Judges reasoned that Dr. Khosrovi had the same rationale for all of the requested conditions. It was his opinion that Ms. Queen's accident did not cause the spurring, but the trauma to the neck did make the conditions symptomatic. The Office of Judges therefore concluded that this Court rejected Dr. Khosrovi's findings, because we authorized treatment for the cervical spine condition. Since Dr. Fox prepared a diagnosis update in this case based on Ms. Queen's latest MRI results, the Office of Judges found that he determined the conditions should be compensable.

The Board of Review affirmed the decision of the Office of Judges regarding the addition of intervertebral disc disorder cervical region and spinal stenosis in the cervical region to the claim. The Board of Review, however, reversed the Order of the Office of Judges regarding the addition of intervertebral disc disorder thoracic region to the claim. It determined that the evidence indicated the thoracic condition was pre-existing and therefore not caused by the work-related injury. The Board of Review relied on the opinion of Dr. Khosrovi. It held that the condition of intervertebral disc disorder of the thoracic region was not a compensable condition in this claim, but treatment for aggravation of the condition was not barred.

This Court finds that the Board of Review mischaracterized the evidentiary record when it gave more weight to the opinion of Dr. Khosrovi rather than that of Dr. Fox. This Court has

previously rejected the medical opinion of Dr. Khosrovi. A preponderance of the evidence indicates that Ms. Queen sustained intervertebral disc disorder thoracic region in the course of her employment. The reasoning and conclusions of the Office of Judges regarding this condition are more consistent with the evidentiary record and this Court's September 10, 2010, decision.

For the foregoing reasons, we find that the decision of the Board of Review is based upon a material misstatement or mischaracterization of the evidentiary record. Accordingly, the decision of the Board of Review which held that the claim was not compensable for intervertebral disc disorder thoracic region is reversed and remanded with instructions to hold the condition compensable. The remaining portions of the Board of Review's Order are affirmed.

Affirmed, in part, and Reversed and Remanded, in part.

ISSUED: January 14, 2014

CONCURRED IN BY:

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

Justice Brent D. Benjamin, Not Participating