

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 21, 2011

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

**MELISSA D. RADABAUGH,
Claimant Below, Petitioner**

**vs.) No. 100792 (BOR Appeal No. 2044047)
(Claim No. 2009080688)**

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

and

**COLDWATER CREEK, INC.,
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 28, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges determined it did not have jurisdiction over Ms. Radabaugh's untimely protest of denial of compensability. The appeal was timely filed by the petitioner and a response was filed by Coldwater Creek, Inc. 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 of the Office of Judges which held Ms. Radabaugh failed to file a protest within the statutory time period and it no longer had jurisdiction over the matter. Ms. Radabaugh asserts the protest was filed untimely do to excusable neglect and good cause exists for the delay in filing. In holding that Ms. Radabaugh untimely filed the protest the Office of Judges held “there has been no showing that the claimant did not receive the Claim Administrator’s Order of May 11, 2009. The motion for late filing of protest was filed more than five months after the entry of the Order.” (December 28, 2009 Office of Judges Order, p. 2). It further held Ms. Radabaugh filed her protest outside the 120 days allowed by statute. The Office of Judges, too, found no basis for further award or for disputing the Claims Administrator’s Order. 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 untimely protest of denial of compensability 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