

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 21, 2011

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

**DEBRA S. ALLEN,
Claimant Below, Petitioner**

**vs.) No. 100805 (BOR Appeal No. 2043795)
(Claim No. 2009063350)**

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

and

**RESCARE,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated June 1, 2010, in which the Board affirmed an October 29, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of additional temporary total disability benefits. The appeal was timely filed by the petitioner and a response was filed by Rescare. 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 or Review entered an Order finding Ms. Allen was not entitled to additional temporary total disability benefits and reinstated the Claim's Administrator's Order denying additional benefits. Ms. Allen asserts the Office of Judges properly granted her temporary total disability benefits up to and including October 13, 2009, based upon her treating physicians determination that she had not reached maximum medical improvement. On the other hand, Rescare asserts Ms. Allen is not entitled to additional temporary total disability benefits for a condition, bulging discs, not recognized as compensable in the claim. Rescare asserts the only compensable injury for Ms. Allen is the sprain/strain injuries Ms. Allen first received at the time of the accident. Dr. Prasadarao Mukkamala performed an independent medical examination finding Ms. Allen at maximum medical improvement and recommending further palliative maintenance care for the continued complaints of pain. Dr. Karen Hultman opined Ms. Allen was still suffering from the effects of her compensable injury and would need additional treatment to meet maximum medical improvement.

In reaching its decision that Ms. Allen has not reached maximum medical improvement the Office of Judges, in its Order, indicated a belief that Dr. Mukkamala's report finding maximum medical improvement unpersuasive and premature in nature. (October 29, 2009 Office of Judges Order, p. 5). It further considered the opinions of Dr. Hultman regarding additional treatment for Ms. Allen's continued complaints of pain and the bulging discs. *Id.*, p. 6. Additionally, it noted Dr. Mukkamala opined regarding additional palative maintenance care for Ms. Allen's complaints of pain in spite of the opinion of maximum medical improvement. *Id.* It held the Claim's Administrator's Order finding maximum medical improvement and closing the claim for temporary total benefits was premature. *Id.*, p. 7.

While the Board of Review reversed the Office of Judges and found the Order was clearly wrong in view of the reliable, probative, and substantial evidence on the whole record. (June 1, 2010 Board of Review Order, p. 2). In considering the evidence on record and the findings of fact of the Office of Judges the Board of Review determined the Claim's Administrator held the claim compensable for the conditions of right shoulder strain, cervical strain, thoracic strain, and right hip strain. *Id.* It further noted the additional complaints of bulging discs were not related to the compensable conditions, therefore, the Office of Judges Order should be reversed and the Claim's Administrator's Order denying additional temporary total disability reinstated. *Id.*

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 additional temporary total disability is affirmed.

Affirmed.

ISSUED: July 21, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin

Justice Menis E. Ketchum