

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 26, 2012

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

KIMBERLY D. POSEY, Petitioner

**vs.) No. 11-0028 (BOR Appeal No. 2044735)
(Claim No. 2009090623)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
HOLLAND ENTERPRISES, LLC, Respondent**

MEMORANDUM DECISION

Petitioner, Kimberly D. Posey, by J. Thomas Greene Jr., her attorney, appeals the Board of Review Order denying compensability for a lumbar spine injury. Holland Enterprises, LLC, by Gary W. Nickerson, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated December 7, 2010, in which the Board affirmed a March 10, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's denial of Ms. Posey's request for compensability for a lumbar spine injury. 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 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.

On February 11, 2009, Ms. Posey asserts she suffered a lumbar spine injury while putting away the weekly food delivery, in the course of and as a result of, her employment with Holland Enterprises. Stanley W. Riffle Jr. submitted an affidavit testifying that Ms. Posey informed him on February 11, 2009, that she injured her back and exhibited signs of pain at that time. Thereafter, Ms. Posey sought medical treatment through her regular chiropractor, Dr. Philip Spar; Tri County Health

Care, Stonewall Jackson Memorial Hospital, and neurosurgical consultations with Dr. Douglas and Dr. Joseph Voelker.

After Dr. Voelker evaluated Ms. Posey and recommended surgery for diagnosed herniated lumbar discs, Ms. Posey completed an Employee's and Physicians' Report of Injury on May 18, 2009. This Report of Injury provided the date of injury as May 6, 2009. During deposition testimony Ms. Posey acknowledged an extensive history of lumbar spine injuries, which she asserted was effectively treated through chiropractic adjustments. However, Ms. Posey stated after the February 11, 2009, injury she continued to experience pain following chiropractic and physical therapy treatment. Ms. Posey continued to receive extensive medical treatment from February 11, 2009, through May of 2009. Ms. Posey acknowledged that she did not recall any specific injury on May 6, 2009, outside her normal delivery activities on that date.

The Office of Judges considered Ms. Posey's claim for compensability and found Ms. Posey alleged she sustained a compensable injury to her lower back on either February 11, 2009, May 6, 2009, or May 8, 2009. "Petitioner testified the significance of the May 6, 2009 date was 'its whenever I went back to the doctor, because nothing was helping from where I'd been hurt before this, and then May 8th is when they put me off work, so May 6th may be the date that I was there.'" The Office of Judges found the characterization of the May 6, 2009, date does not comport with Ms. Posey's report of injury, which Ms. Posey stated actually occurred on May 6, 2009. Additionally, Ms. Posey acknowledged an injury on February 11, 2009, which was corroborated by Stanley W. Riffle Jr.

This testimony was found to conflict with the physical therapy report from Stonewall Jackson Memorial Hospital dated March 3, 2009, wherein Ms. Posey reported chronic low back pain and denied injury, except as a child, describing a sled riding incident. The Office of Judges placed significant weight on the difference between the date of injury being between the two May of 2009 dates, possibly attributable to clerical error, and the February 11, 2009, date, that raises the question of whether the difference is truly a clerical error. "The record certainly demonstrates that the claimant was undergoing substantial treatment for low back pain and had undergone two diagnostic tests prior to May 6 or May 9, 2009, certainly suggesting the presence of a real problem." The Office of Judges, too, found no basis for finding Ms. Posey's injury is work-related and compensable, or for disputing the claims administrator's findings. The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of December 7, 2010.

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 Court affirms the Board of Review Order denying Ms. Posey's request for compensability for the lumbar spine injury.

Affirmed.

ISSUED: **July 26, 2012**

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh