

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

September 18, 2012

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

CRYSTAL L. MCNEES, Petitioner

vs.) No. 11-0046 (BOR Appeal No. 2044397)
(Claim No. 2008037393)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WITSCH EYS MARKET, INC., Respondent**

MEMORANDUM DECISION

Petitioner, Crystal L. McNees, by Robert L. Stultz, her attorney, appeals the Board of Review Order. Witscheys Market, Inc., by Alyssa A. Sloan, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 7, 2010, in which the Board reversed an April 2, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's denial of additional temporary total disability benefits, vocational rehabilitation services, and diagnostic imaging. 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. 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.

Ms. McNees asserts she suffered a cervical and thoracic spine injury while attempting to lift a box of pizzas off a shelf in a freezer on March 26, 2008. Following the injury, Ms. McNees was treated for a thoracic spine injury in the emergency room. During follow-up visits with Dr. Clifford Myers, Ms. McNees complained of continued pain and muscle spasms across the thoracic spine region.

An MRI of the thoracic spine, on October 1, 2008, showed C4-5 level broad based disc bulge with mild left foraminal stenosis and C5-6 disc osteophyte complex with mild spinal stenosis and mild bilateral foraminal stenosis. Dr. Joseph E. Grady II conducted an independent medical examination on November 14, 2008, in which he noted that Ms. McNees had significant structural abnormalities in the lower cervical region; however, Ms. McNees did not report any

particular pain in the cervical region during his evaluation. On March 17, 2009, Ms. McNees was seen by Dr. Myers and complained of increased chest pain, dropping items, and mid thoracic back pain. Dr. Myers diagnosed Ms. McNees with cervical neuropathy.

The Office of Judges held that the decision to close Ms. McNees's claim for temporary total disability benefits was premature due to the fact that Ms. McNees has not reached maximum medical improvement; the Office of Judges further held that Ms. McNees is entitled to vocational rehabilitation services in the future. The Board of Review disagreed with the Office of Judges' Order finding that Ms. McNees was entitled to continued temporary total disability benefits and future vocational rehabilitation services, based upon the opinion of Dr. Grady. The Office of Judges found that Dr. Grady's opinion that Ms. McNees was at maximum medical improvement for the approved diagnoses was premature, given the results of subsequent diagnostic imaging revealing additional problems that are the result of the compensable injuries. As a result, the Office of Judges held that Ms. McNees is entitled to continued temporary total disability benefits, that she is entitled to vocational rehabilitation services as soon as she is physically able to engage in them, and that she is entitled to further diagnostic imaging. We agree with the reasoning and conclusion of the Office of Judges.

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. Therefore, the December 7, 2010, Order of the Board of Review is reversed and the case is remanded with instructions to reinstate the April 2, 2010, Order of the Office of Judges.

Reversed and Remanded.

ISSUED: September 18, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Robin J. Davis
Justice Brent D. Benjamin