

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

May 24, 2013

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

**LINDA K. POLING,**  
**Claimant Below, Petitioner**

**vs.) No. 11-0523** (BOR Appeal No. 2045057)  
(Claim No. 2009054679)

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

**and**

**AETNA BUILDING MAINTENANCE, INC.,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Linda Poling, by George Zivkovich, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Aetna Building Maintenance, Inc., by Gary Nickerson and James Heslep, its attorneys, filed a timely response.<sup>1</sup>

This appeal arises from the Board of Review's Final Order dated March 4, 2011, in which the Board affirmed a September 9, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 15, 2010, decision closing the claim for temporary total disability benefits. 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, the Court finds no substantial question of law and no prejudicial error. For these

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<sup>1</sup> Pursuant to an Order dated April 11, 2013, the Old Fund was dismissed as a party to the present appeal.

reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Ms. Poling injured her lumbar spine on February 12, 2008, when she fell from a chair while removing a box from a shelf. On November 30, 2009, the Office of Judges held the claim compensable for contusion of the back and found that Ms. Poling was eligible for temporary total disability benefits from February 12, 2008, through March 11, 2009, and further stated that additional temporary total disability benefits may be paid, as substantiated by appropriate medical evidence. Ms. Poling did not protest this Order, nor did she protest the January 26, 2010, claims administrator's decision reflecting the November 30, 2009, Order, and the claim was closed with regard to temporary total disability benefits on March 15, 2010.

In its September 9, 2010, Order affirming the March 15, 2010, claims administrator's decision, the Office of Judges held that the claim was properly closed for temporary total disability benefits. Ms. Poling disputes this finding and asserts that the medical evidence of record demonstrates that she remained temporarily and totally disabled from March 12, 2009, through March 3, 2010, and that she is therefore entitled to temporary total disability benefits for that time period.

The evidence of record does not support a finding that Ms. Poling was temporarily and totally disabled beyond March 11, 2009. The Office of Judges noted Dr. Guberman's finding that as of March 3, 2010, Ms. Poling had reached maximum medical improvement. Additionally, the Office of Judges found that based on Dr. DeJosef's March 16, 2010, statement that Ms. Poling should undergo a permanent partial disability evaluation, it can reasonably be assumed that Dr. DeJosef felt that Ms. Poling was at maximum medical improvement. The Office of Judges then found that because Ms. Poling has reached maximum medical improvement, she is not entitled to temporary total disability benefits pursuant to West Virginia Code § 23-4-7a (2005). The Board of Review reached the same reasoned conclusions in its decision of March 4, 2011.

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 decision of the Board of Review is affirmed.

Affirmed.

**ISSUED: May 24, 2013**

**CONCURRED IN BY:**

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II