

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 17, 2012

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

CHRYSTAL BJORK, Petitioner

**vs.) No. 11-0674 (BOR Appeal No. 2045087)
(Claim No. 2009058079)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
BECKLEY APPALACHIAN REGIONAL HEALTHCARE,
Respondent**

MEMORANDUM DECISION

Petitioner Chrystal Bjork, by Reginald Henry, her attorney, appeals the West Virginia Workers' Compensation Board of Review's Order granting a 5% permanent partial disability award. Beckley Appalachian Regional Healthcare, by H. Dill Battle III, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated March 21, 2011, in which the Board affirmed a September 15, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's June 24, 2009, Order granting a 5% permanent partial disability award for the 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 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.

Ms. Bjork was working for Beckley Appalachian Regional Healthcare as a phlebotomist when she fell and injured her lower back on August 25, 2008. On September 18, 2008, the claims administrator held the claim compensable for a lumbar sprain. The claims administrator on June 24, 2009, granted Ms. Bjork a 5% permanent partial disability award based on the report by Dr. Mukkamala.

The Office of Judges, in reaching its decision to affirm the claims administrator, concluded that a 5% permanent partial disability award accurately reflects the permanent impairment Ms. Bjork has due to the compensable injury. Ms. Bjork disagrees and asserts that Dr. Guberman's recommendation of a 13% impairment is more accurate and persuasive. Beckley Appalachian Regional Healthcare maintains that Dr. Landis's report is the most persuasive given Ms. Bjork's medical history, her extensive previous surgical procedure, and her long history of low back problems. Dr. Landis found that Dr. Mukkamala's 5% impairment recommendation was accurate given the compensable injury was superimposed on preexisting advanced degenerative disc disease. Dr. Guberman found Ms. Bjork suffered from a 24% impairment for the lumbar spine, including a sensory deficit, with 13% impairment attributable to the compensable injury. The Office of Judges noted that an EMG showed no evidence of radiculopathy despite Dr. Guberman's findings. It also noted that Dr. Guberman apportioned greater impairment to the less complicated, less serious compensable injury than the extensive preexisting condition.

In reaching the conclusion to deny the request for an additional permanent partial disability award, the Office of Judges concluded that the report of Dr. Landis was more credible and persuasive than the report of Dr. Guberman. The Office of Judges noted that Ms. Bjork has had extensive back problems since 1999. It also noted that Dr. Guberman addressed the cervical spine, which was not held compensable in this claim. The Office of Judges found the evidence supported a 5% permanent partial disability award for the compensable lumbar sprain. The Board of Review reached the same reasoned conclusion in its decision of March 21, 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 Board of Review Order is affirmed.

Affirmed.

ISSUED: July 17, 2012

CONCURRED IN BY:

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum

Justice Brent D. Benjamin not participating