

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

June 6, 2013

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

**MARCI HOGE,**  
**Claimant Below, Petitioner**

**vs.) No. 11-1334** (BOR Appeal No. 2045688)  
(Claim No. 2007212934)

**KROGER LIMITED PARTNERSHIP I,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Marci Hoge, by Jonathan Bowman, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Kroger Limited Partnership I, by Sean Harter, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated August 24, 2011, in which the Board affirmed a February 16, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's January 26, 2010, and August 24, 2011, decisions granting Ms. Hoge a 4% permanent partial disability award for the right shoulder injury, and denying a request to reopen 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 reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Ms. Hoge works for Kroger Limited Partnership I as a deli clerk. She injured her right shoulder while at work on July 13, 2006. She has been treated conservatively for the injury. On January 26, 2010, the claims administrator granted Ms. Hoge a 4% permanent partial disability award for the right shoulder injury based on the report by Dr. Grady. On August 3, 2010, the claims administrator denied a request to reopen the claim for temporary total disability benefits.

The Office of Judges affirmed the claims administrator's decisions, and held that the preponderance of the evidence established that Ms. Hoge was entitled to only a 4% permanent partial disability award for the right shoulder, and that she was not entitled to a reopening of the claim for temporary total disability benefits. Ms. Hoge appeals the decision to affirm the 4% permanent partial disability award only. On appeal, Ms. Hoge argues that she is entitled to an additional 4% permanent partial disability award, as evidenced by the report of Dr. Dauphin. Kroger maintains that the evidence supports only a 4% permanent partial disability award. Dr. Grady evaluated Ms. Hoge on January 7, 2010, and concluded that she suffered from 4% whole person impairment resulting from the right shoulder injury. Dr. Dauphin found that she suffered from 8% whole person impairment. On September 24, 2010, Dr. Hennessey found 4% whole person impairment, and agreed with Dr. Grady.

In affirming the claims administrator's decision, the Office of Judges concluded that a preponderance of the evidence established that Ms. Hoge suffers from 4% whole person impairment attributable to the compensable right shoulder injury. It noted that while Ms. Hoge had continued impairment, diagnostic testing had not revealed the presence of a surgically correctable lesion. Further, the Office of Judges noted that Ms. Hoge's treatment had been limited to pain relievers. It concluded that the evidence did not support an additional permanent partial disability award. The Board of Review reached the same reasoned conclusions in its decision of August 24, 2011. We agree with the reasoning and conclusions of the Board of Review.

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: June 6, 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