

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

SHERRY L. KITCHEN, Petitioner

March 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 101477 (BOR Appeal No. 2044413)
(Claim No. 2005000473)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
D & D FAST FOODS, INC., Respondent

MEMORANDUM DECISION

Petitioner Sherry L. Kitchen, by M. Jane Glauser, her attorney, appeals the decision of the Board of Review. The West Virginia Office of Insurance Commissioner, by Anna L. Faulkner, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 13, 2010, in which the Board affirmed a March 19, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's November 18, 2008, decision stating that Ms. Kitchen is not entitled to a permanent partial disability award for her June 20, 2004, injury. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. 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.

In its Order, the Office of Judges held that Ms. Kitchen did not suffer a permanent impairment as a result of her June 20, 2004, injury. Ms. Kitchen disputes this finding and asserts that the Office of Judges erred in its decision not to consider the EMG report by Dr. Sella.

The Office of Judges held that Dr. Sella's report was untimely because Ms. Kitchen's time frame to submit evidence expired on June 19, 2009, and the report of Dr. Sella was received on

November 12, 2009. The Office of Judges then found that based on Dr. Doyle's exam, there was no medical evidence showing that Ms. Kitchen suffered a permanent impairment as a result of her June 10, 2004, injury. The Board of Review reached the same reasoned conclusion in its decision of October 13, 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 the Board's material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: March 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