

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

PATRICIA FULTON, Petitioner

vs.) **No. 101267 (BOR Appeal No. 2044359)**
(Claim No. 2009091502)

FILED

June 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
GUEST SERVICES, INC., d/b/a CANAAN
VALLEY RESORTS, Respondent**

MEMORANDUM DECISION

Petitioner, Patricia Fulton, by Robert L. Stultz, appeals the Board of Review Order rejecting her claim. Guest Services, Inc., d/b/a Canaan Valley Resorts, by James W. Heslep, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated September 1, 2010, in which the Board affirmed a March 8, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's June 5, 2009, Order, which rejected Ms. Fulton's claim. 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 parties' submissions 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 briefs, and the record presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

The Board of Review affirmed the Office of Judge's Order, which affirmed denial of Ms. Fulton's claim. Ms. Fulton claims that she injured her back at work while picking up towels from a bathtub. Ms. Fulton sought medical treatment the following day, and she was diagnosed with a myofascial strain. Guest Services argues that Ms. Fulton failed to inform it of her injury until six days following the alleged injury, which should weigh against a finding of compensability. Moreover, Guest Services notes that Ms. Fulton's treating physician classified the injury as an aggravation of a prior condition.

Although a claimant is directed to provide written notification of a work-related injury to his

or her employer, “under no circumstances shall the fact that notice of an occupational injury was provided by the claimant later than two (2) working days from the time of the injury be the sole basis for denial of a claim.” West Virginia Code of State Rules § 85-1-3.1.

Additionally, “[t]he fact that an employee, injured in performing services arising out of and incidental to his employment, was already afflicted with a progressive disease that might some day have produced physical disability, is no reason why the employee should not be allowed compensation, under Workmen’s Compensation Act, for the injury which, added to the disease, superinduced physical disability.” *Charlton v. Workmen’s Comp. Comm’r*, 160 W. Va. 664, 667, 236 S.E.2d 241, 243 (1977). “A diseased workman who in the course of and resulting from his employment receives an injury, which aggravates or accelerates the disease, to the extent of causing a disability sooner than would otherwise have occurred, is entitled to compensation from Workmen’s Compensation Fund.” *Id.* Thus, the fact that a claimant has a preexisting condition does not defeat compensation where that preexisting condition is aggravated by a work-related injury.

The Office of Judges noted first that Ms. Fulton failed to timely report her injury to Guest Services. It also noted that it would appear that this injury was an aggravation or exacerbation of her prior back injuries. Further, it highlighted the fact that Ms. Fulton’s treating physician specifically noted that the injury was an aggravation of a prior injury or disease. Thus, the Office of Judges affirmed the rejection of Ms. Fulton’s claim because the evidence establishes that the claimant’s condition is the result of an aggravation of her prior back injuries. The Board of Review, in turn, affirmed the Office of Judges on September 1, 2010.

As set forth above, a claim may be held compensable when a work-related injury aggravates a preexisting condition. The fact that Ms. Fulton suffered from prior back injuries and her treating physician’s classification of the subject injury as an aggravation of these prior injuries does not defeat compensation. Therefore, the rejection of Ms. Fulton’s claim for benefits is reversed.

For the foregoing reasons, we find that the decision of the Board of Review is clearly the result of an erroneous conclusion of law. Therefore, the Board of Review Order is reversed.

Reversed.

ISSUED: June 14, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Margaret L. Workman

Justice Thomas E. McHugh

DISSENTING:

Justice Robin Jean Davis

Justice Brent D. Benjamin not participating