

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**THERESA M. RODRIGUEZ,**  
**Claimant Below, Petitioner**

**FILED**  
January 14, 2014  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

vs.) **No. 12-0713** (BOR Appeal No. 2046548)  
(Claim No. 2011037002)

**KROGER LIMITED PARTNERSHIP 1,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Theresa M. Rodriguez, by Raymond A. Hinerman and Christopher J. Wallace, her attorneys, appeals the decision of the West Virginia Workers' Compensation Board of Review. Kroger Limited Partnership 1, by Sean Harter, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated May 11, 2012, in which the Board reversed in part and affirmed in part an October 26, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges dismissed as moot the claims administrator's June 14, 2011, decision determining that Ms. Rodriguez is not eligible for lost time benefits. It affirmed the claims administrator's June 16, 2011, decision denying Ms. Rodriguez's request to add left hip and lumbar strain as compensable components. 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 that the Board of Review's decision is based upon a material misstatement or mischaracterization of the evidentiary record. This case satisfies the "limited circumstances" requirement of Rule 21(d) of the Rules of Appellate Procedure and is appropriate for a memorandum decision rather than an opinion.

Ms. Rodriguez was working as a bagger for Kroger Limited Partnership 1 on May 3, 2011, when she was pushing a shopping cart and felt a pull in her groin area. Dr. Hennessey questioned whether an incident had occurred but opined if one had it was limited to a left groin strain. The claims administrator's decision dated June 14, 2011, held the claim compensable for left groin and upper leg strain/sprain but determined Ms. Rodriguez was not eligible for lost time benefits because she missed less than four days of work. The claims administrator's decision

dated June 16, 2011, denied Ms. Rodriguez's request to add left hip strain and lumbar strain as compensable components.

The Office of Judges dismissed the claims administrator's decision dated June 14, 2011, as moot and affirmed the claims administrator's decision dated June 16, 2011, and held that the additional components of left hip and lumbar strain are not supported as compensable by the preponderance of the evidence. The Board of Review reversed in part the Office of Judges' Order on the issue of compensability for the left hip strain and held the left hip strain was a compensable component. The Board of Review affirmed the remainder of the Office of Judges' Order. On appeal, Ms. Rodriguez disagrees and asserts that her left hip and lumbar complaints have been consistent throughout the history of this claim. She further asserts that the medical evidence submitted clearly shows she is entitled to additional temporary total disability benefits and that this is not a "no lost time" claim.

The Board of Review erred in adding the diagnosis of hip strain as a compensable component. The Board of Review relied on the facts that Ms. Rodriguez heard a popping noise when the injury occurred, complained on a few occasions of left side pain, and was referred for an MRI of the left hip. The Board of Review did not consider that the MRI of the left hip revealed normal findings. The Office of Judges correctly found that left hip strain was not a compensable component because there was normal neuromuscular clinical findings and normal results for the left hip x-rays and MRI.

The Board of Review and the Office of Judges correctly dismissed the claims administrator's decision dated June 14, 2011, as moot because Ms. Rodriguez did receive a period of temporary total disability benefits. The Office of Judges did not address the issue of further temporary total disability benefits since an August 29, 2011, Order suspending temporary total disability benefits was appealed by Ms. Rodriguez and can be addressed through the litigation process. The Board of Review and the Office of Judges also correctly affirmed the claims administrator's decision dated June 16, 2011, denying the diagnosis of lumbar strain as a compensable component. Dr. Hennessey questioned whether an incident on May 3, 2011, actually occurred but opined if one had it was limited to a left groin strain. The hospital records, incident report, and report of occupational injury do not indicate any components beyond the left groin and upper leg strain/sprain related to the May 3, 2011, injury at work. The Office of Judges held that adding the left hip strain and lumbar strain as compensable components was not supported by the preponderance of the evidence and dismissed as moot the issue of lost time benefits. We reverse the Board of Review in part on the compensability of the left hip strain and reinstate the Office of Judges' Order on this issue and affirm the remainder of the Board of Review's Order.

For the foregoing reasons, we find that the decision of the Board of Review is based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is reversed in part on the compensability of left hip strain and the Office of Judges' Order dated October 26, 2011, denying the request of left hip strain as a compensable component is reinstated. The remainder of the Board of Review's Order is affirmed.

Affirmed in part and reversed in part.

**ISSUED: January 14, 2014**

**CONCURRED IN BY:**

Chief Justice Robin J. Davis  
Justice Margaret L. Workman  
Justice Menis E. Ketchum  
Justice Allen H. Loughry II

Justice Brent D. Benjamin, Not Participating