

## SUPREME COURT OF APPEALS OF WEST VIRGINIA

# Bonnie S. Pishner v. West Virginia Department of Health & Human Resources

No. 16-0272 (BOR Appeal No. 2050827) (Claim No. 2015000924) · No. No. 16-0272 · Decided March 3, 2017

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### SUMMARY

The Supreme Court of Appeals of West Virginia affirmed the Board of Review's denial of Bonnie S. Pishner's workers' compensation claim for carpal tunnel syndrome. The court agreed that the evidence supported the conclusion that her hand symptoms resulted from osteoarthritis rather than an occupationally caused condition and that her clerical work did not present a high occupational risk for carpal tunnel syndrome.

### CASE DETAILS

|                       |                                                                                                                                                                                                                                                                            |
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| COURT                 | Supreme Court of Appeals of West Virginia                                                                                                                                                                                                                                  |
| WRITING FOR THE COURT | Chief Justice Allen H. Loughry II; Justice Robin J. Davis; Justice Margaret L. Workman; Justice Menis E. Ketchum; Justice Elizabeth D. Walker                                                                                                                              |
| JURISDICTION          | West Virginia                                                                                                                                                                                                                                                              |
| DECIDED               | March 3, 2017                                                                                                                                                                                                                                                              |
| DOCKET                | No. 16-0272                                                                                                                                                                                                                                                                |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                                   |
| PROCEDURAL POSTURE    | Petitioner appealed the West Virginia Workers' Compensation Board of Review's affirmance of an order rejecting her workers' compensation claim for carpal tunnel syndrome.                                                                                                 |
| STANDARD OF REVIEW    | The court reviewed whether the Board of Review's decision was in clear violation of a constitutional or statutory provision, clearly resulted from erroneous conclusions of law, or was based on a material misstatement or mischaracterization of the evidentiary record. |
| PRECEDENTIAL VALUE    | Memorandum decision with limited precedential value                                                                                                                                                                                                                        |
| PARTIES               | Bonnie S. Pishner v. West Virginia Department of Health & Human Resources                                                                                                                                                                                                  |

### TOPICS

workers compensation

appellate procedure

administrative law

standard of review

health law

## PRACTICE AREAS

workers compensation

administrative law

health law

## QUESTIONS PRESENTED

1. Whether the Workers' Compensation Board of Review clearly erred in affirming the rejection of Pishner's claim for occupational carpal tunnel syndrome.
2. Whether the evidentiary record supported the conclusion that Pishner's symptoms resulted from osteoarthritis rather than a compensable occupational carpal tunnel syndrome.

## HOLDINGS

1. The Board of Review's decision rejecting Pishner's claim was not in clear violation of a constitutional or statutory provision, was not clearly the result of erroneous conclusions of law, and was not based on a material misstatement or mischaracterization of the evidentiary record.

## KEY QUOTATIONS

*"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." (2-3)*

## FACTUAL BACKGROUND

Bonnie S. Pishner, a former director who had worked for the West Virginia Department of Health & Human Resources for thirty-nine years, alleged that typing and occasional long-distance driving caused occupational carpal tunnel syndrome. Although some medical providers diagnosed carpal tunnel syndrome, independent medical evaluators attributed her hand and wrist symptoms to osteoarthritis and concluded that her electrodiagnostic studies were invalid or did not establish carpal tunnel syndrome. The lower tribunals also found that her work duties did not place her in an occupational group presenting a high risk for carpal tunnel syndrome.

## PROCEDURAL HISTORY

The claims administrator rejected the claim on September 15, 2014. The Workers' Compensation Office of Judges affirmed that decision on September 25, 2015, and the Board of Review affirmed the Office of Judges on February 22, 2016. The Supreme Court of Appeals of West Virginia affirmed the Board of Review.

## DISPOSITION

affirmed

## OPINION

PER CURIAM.

STATE OF WEST VIRGINIA SUPREME COURT OF APPEALS FILED BONNIE S. PISHNER, March 3, 2017 RORY L. PERRY II, CLERK Claimant Below, Petitioner SUPREME COURT OF APPEALS OF WEST VIRGINIA vs.) No. 16-0272 (BOR Appeal No. 2050827) (Claim No. 2015000924) WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES, Employer Below, Respondent MEMORANDUM DECISION Petitioner Bonnie S. Pishner, by Reginald D. Henry, her attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review.

West Virginia Department of Health & Human Resources, by Lisa Warner Hunter, its attorney, filed a timely response. This appeal arises from the Board of Review's Final Order dated February 22, 2016, in which the Board affirmed a September 25, 2015, Order of the Workers' Compensation Office of Judges.

In its Order, the Office of Judges affirmed the claims administrator's September 15, 2014, decision which rejected the claim. 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. Pishner, a former Director of the Adult Services Policy Unit with the West Virginia Department of Health & Human Resources, alleges she developed carpal tunnel syndrome in the course of and resulting from her employment over the course of thirty-nine years.

Ms. Pishner testified in a hearing before the Office of Judges that she typed for long periods of the day for most of her employment. As a trainer, she had to type along with the trainees in order to teach them the material. Additionally, Ms. Pishner occasionally had to drive long distances to the training sites. 1 In August of 2010, Ms. Pishner was diagnosed with osteoarthritis predominantly at the distal interphalangeal joints of the middle, ring, and little fingers of both hands.

On August 9, 2011, Ms. Pishner saw Michael Kominsky, D.C., who performed an EMG/NCS study. His findings were consistent with carpal tunnel syndrome. Ms. Pishner was referred to Stephen Whitfield, M.D., an orthopedic surgeon, who also diagnosed moderate bilateral carpal tunnel syndrome and mild to moderate bilateral first carpometacarpal osteoarthritis.

On March 25, 2014, Dr. Kominsky performed another EMG/NCS study which revealed a right median nerve neuropathy at or across the wrist affecting both the sensory and motor fibers. These

findings were consistent with carpal tunnel syndrome. Upon filing a claim, Ms. Pishner underwent two independent medical evaluations.

On August 19, 2014, Ms. Pishner saw Paul Bachwitt, M.D., for an independent medical evaluation. Dr. Bachwitt diagnosed degenerative arthritis and basal joint arthritis, which he opined was compatible with her age of sixty-five years old. Dr. Bachwitt did not believe Ms. Pishner's symptoms revealed clear cut carpal tunnel syndrome. He noted that usually an individual does not develop carpal tunnel syndrome from clerical duties such as typing.

On September 15, 2014, the claims administrator rejected the claim based on Dr. Bachwitt's report. Ms. Pishner underwent another independent medical evaluation with Marsha Bailey, M.D., on May 18, 2015. Dr. Bailey also found that Ms. Pishner was not suffering from carpal tunnel syndrome. Rather, Dr. Bailey opined that Ms. Pishner's symptoms of constant hand pain, loss of strength in her hands, finger pain at the site of her arthritic nodules, pain in the carpometacarpal joints of both thumbs, and bilateral wrist pain were exclusively the result of her osteoarthritis.

Dr. Bailey further noted that the electrodiagnostic studies performed by Dr. Kominsky were not valid. Finally, Dr. Bailey found that Ms. Pishner did not fall into an occupational group with a high risk for carpal tunnel syndrome, and medical studies have failed to show a relationship between normal clerical activities and carpal tunnel syndrome.

On September 25, 2015, the Office of Judges affirmed the claims administrator's decision rejecting the claim. After reviewing the evidence, the Office of Judges found that Ms. Pishner's argument was not as persuasive as that of the West Virginia Department of Health & Human Resources. While Ms. Pishner submitted documentation from doctors who diagnosed her with carpal tunnel syndrome, both Dr. Bachwitt and Dr. Bailey reached the conclusion that her symptoms were a result of her osteoarthritis.

Medical records showed that Ms. Pishner had first been diagnosed with osteoarthritis in 2010 and received treatment for the arthritis and fibromyalgia. The Office of Judges found that her work duties did not place her in an occupational group for high risk set forth in West Virginia Code of State Rules §85-20-41.5 (2006).

The Board of Review adopted the findings of fact and conclusions of law and affirmed the Office of Judges' Order on February 22, 2016. We agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Ms. Pishner has a history of osteoarthritis in both hands. Both independent medical evaluations concluded Ms. Pishner's symptoms were due to her arthritis and not carpal tunnel syndrome.

Additionally, Ms. Pishner did not have any occupational high risk factors for developing carpal tunnel syndrome. 2 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: March 3, 2017  
CONCURRED IN BY: Chief Justice Allen H. Loughry II Justice Robin J. Davis Justice Margaret  
L. Workman Justice Menis E. Ketchum Justice Elizabeth D. Walker 3

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