

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

ROBERT E. MCVICKER,
Claimant Below, Petitioner

FILED
October 4, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) **No. 12-0012** (BOR Appeal No. 2046245)
(Claim No. 20080034634)

WEST VIRGINIA DIVISION OF HIGHWAYS,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Robert E. McVicker, by William B. Gerwig III, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Division of Highways, by Matthew L. Williams, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated December 13, 2011, in which the Board affirmed an August 4, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's July 19, 2010, decision granting an 8% permanent partial disability award. 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.

On March 10, 2008, Mr. McVicker allegedly suffered an injury to his neck and to the area between his shoulder blades. He was driving a dump truck for the West Virginia Division of Highways when another vehicle clipped the front bumper of his truck. On April 6, 2010, Dr. Mukkamala recommended a 0% impairment for the thoracic sprain, and an 8% impairment for the cervical sprain.

The Office of Judges affirmed the claims administrator's decision, and held that Mr. McVicker had an 8% whole person impairment for the cervical spine, and a 0% whole person impairment for the thoracic spine. On appeal, Mr. McVicker disagrees and asserts that West

Virginia Code of State Rules § 85-20 (2006) is unlawful in providing for the reduction of permanent partial disability based upon preconceived ranges of impairment when each claimant should be compensated based upon the degree of his medical impairment, and further argues that it contradicts West Virginia Code §23-4-6(i). The West Virginia Division of Highways maintains that the statutory and regulatory provisions for rating permanent partial disability awards are clear and well settled, as shown in *Simpson v. W. Va. Office of the Ins. Comm'r*, 223 W.Va. 495, 678 S.E.2d 1 (2009) and were properly applied.

The Office of Judges considered *Simpson* where this Court held that West Virginia Code of State Rules Table § 85-20-C (2004) is valid and a proper exercise of the rule making authority delegated to Workers' Compensation Board of Managers in West Virginia Code § 23-4-3b(b) (2005). The Office of Judges concluded that there is no reason to believe that this Court would treat West Virginia Code of State Rules Table § 85-20-E for the cervical spine any differently. Ultimately, the Office of Judges held that Dr. Mukkamala correctly applied West Virginia Code of State Rules § 85-20 (2006), and that his recommendation of an 8% whole person impairment for the cervical spine is affirmed. The Board of Review reached the same reasoned conclusions in its decision of December 13, 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: October 4, 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