

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

**ADAM D. MILAM,
Claimant Below, Petitioner**

**August 5, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**vs.) No. 101029 (BOR Appeal No. 2044143)
(Claim No. 2008001845)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent**

and

**CAPITOL BEVERAGE COMPANY,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated August 9, 2010, in which the Board affirmed a February 9, 2010, Order of the Workers' Compensation Office of Judges granting Petitioner 8% permanent partial disability. In its Order, the Office of Judges reversed the claims administrator's Order granting Petitioner 0% permanent partial disability. The appeal was timely filed by the petitioner and a response was filed by the Capitol Beverage Company. 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, response, 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.

Mr. Milam asserts the Board of Review improperly discounted the opinion of Dr. Victor Poletajev in determining the proper disability award of his compensable injury. Unlike Drs. Joseph E. Grady, II and Saghir R. Mir, Dr. Poletajev properly determined Petitioner's impairment based upon Rule 20. Capitol Beverage Company asserts the Office of Judges properly took into consideration the recommendations of Drs. Grady, Poletajev, and Mir in determining Mr. Milam's impairment rating. Dr. Mir's report occurred the latest in time and it appeared that some of Mr. Milam's complaints resolved during the period of time after Dr. Poletajev's examination.

In its Order granting Petitioner an 8% permanent partial disability award the Office of Judges considered the opinions of each of the examining physicians. It noted that each physician opined Petitioner was entitled to differing levels of disability, with both Drs. Grady and Mir opining Petitioner did not suffer from any continuing complaints of radiculopathy. (February 9, 2010 Office of Judges Order, pp. 5-6). It found the preponderance of the evidence establishes Mr. Milam has an impairment. *Id.* In determining the level of impairment it considered the report of Dr. Mir occurring the most recent in time and indicating Mr. Milam suffered from an 8% impairment with many of the impairment found during Dr. Poletajev's examination resolved and Mr. Milam no longer suffering from a 17% impairment. The Office of Judges, too, found no basis for further award outside the 8% permanent partial disability awarded by the Claims Administrator's Order. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of August 9, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provisions, clearly the result of erroneous conclusions of law, or is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of the petitioner's request for a total award of 17% permanent partial disability is affirmed.

Affirmed.

ISSUED: August 5, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum