

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JOHNNY D. ORRAS,
Claimant Below, Petitioner

vs.) No. 101550 (BOR Appeal No. 2044546)
(Claim No. 2003040183)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

NELL JEAN INDUSTRIES, INC.,
Employer Below, Respondent

FILED
July 29, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated November 8, 2010, in which the Board affirmed an April 29, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's March 26, 2009 Order, which granted Mr. Orras a 5% permanent partial disability award for his thoracic spine. The appeal was timely filed by the petitioner, and the West Virginia Office of Insurance Commissioner filed a response. 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 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.

The Board of Review affirmed the Office of Judge's Order, which granted a 5%

permanent partial disability award for Mr. Orras's February 20, 2003 thoracic spine injury. Mr. Orras argued that, contrary to the Board of Review's assertion, Dr. Bruce A. Guberman's report, which found 8% thoracic spine impairment, did take into account degenerative changes in Mr. Orras's thoracic spine by virtue of his notation of Mr. Orras's MRI revealing the degenerative changes. Mr. Orras argues that Dr. Guberman simply did not believe that the degenerative changes affected his level of impairment.

Mr. Orras also takes issue with the Board of Review's classification of these degenerative changes as "preexisting." Mr. Orras contends that the earliest indication of the degenerative changes is found four to five years following his compensable injury. Finally, Mr. Orras states that Dr. Ramanathan Padmanaban's report, which found 5% thoracic spine impairment, should not be accorded as much weight as Dr. Guberman's due to Dr. Padmanaban's failure to utilize Table 75 of the *AMA Guides*. Dr. Padmanaban did not assign an impairment rating from this table because he did not attribute the degenerative changes to Mr. Orras's compensable injury.

The Office of Judges noted first that Mr. Orras's thoracic spine degenerative changes were noted as early as March 2003 - approximately one month following his compensable injury. (Apr. 29, 2010 Office of Judges Order, p. 4.) Because degenerative changes do not occur in such a short time span, Dr. Padmanaban characterized these as preexisting. As such, Dr. Padmanaban accounted for this preexisting condition in calculating his impairment rating. *Id.* Dr. Guberman, on the other hand, did not. *Id.* Accordingly, the Office of Judges accorded more weight to Dr. Padmanaban's report in affirming the claims administrator's grant of a 5% permanent partial disability award for Mr. Orras's thoracic spine injury. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its November 8, 2010 decision.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the grant of a 5% permanent partial disability award for Mr. Orras's thoracic spine injury is affirmed.

Affirmed.

ISSUED: July 29, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum
Justice Thomas E. McHugh