

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JOHN R. GREW,
Claimant Below, Petitioner

vs.) No. 100711 (BOR Appeal No. 2043822)
(Claim No. 2008001658)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

WHEELING-PITTSBURGH STEEL CORPORATION,
Employer Below, Respondent

FILED
July 15, 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 April 20, 2010, in which the Board reversed a November 17, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges modified an August 27, 2008 Order of the claims administrator and granted a 3% permanent partial disability award in addition to the 2% award granted by the claims administrator. The appeal was timely filed by the petitioner, and Wheeling-Pittsburgh Steel Corporation 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, the Court is of the opinion that this case 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 reversed the November 17, 2009, Office of Judges' Order,

which granted an additional 3% permanent partial disability award. The Board of Review noted that three physicians have provided impairment ratings: Dr. Bruce Guberman, Dr. James Lundeen, Sr., and Dr. Victoria Langa. Dr. Guberman found 0% impairment for the lumbar spine aspect of Mr. Grew's injury and 2% impairment for the right arm. Similarly, Dr. Langa found 0% impairment for the lumbar spine and 2% impairment for the right upper extremity. Dr. Lundeen, however, found 8% impairment for the lumbar spine and 16% impairment for Mr. Grew's right elbow.

Mr. Grew argues that an 8% impairment rating should be given for his lumbar impairment and that he should receive a 3% award for his upper extremity impairment. With respect to his upper extremity impairment, the Office of Judges found that Mr. Grew was entitled to a 2% impairment rating based upon Dr. Guberman's and Dr. Langa's recommendations. It found Dr. Lundeen's recommendation to be unreliable due to his rating of loss of grip strength separately. The *Guides* instruct that a separate loss of strength rating may be provided only "in a rare case." Dr. Lundeen failed to explain why or if he considered Mr. Grew's case rare. Further, Dr. Lundeen failed to specifically refer to the *Guide's* "index of loss of strength." The Board of Review agreed with these findings and conclusions in affirming the 2% permanent partial disability award regarding Mr. Grew's upper extremity impairment.

Regarding Mr. Grew's lumbar spine impairment, the Office of Judges again discredited Dr. Lundeen's recommendation due to his failure to make an impairment rating pursuant to Rule 20. It then looked to Dr. Guberman's 8% impairment rating and Dr. Langa's 5% impairment rating, both of which were discounted in their entirety due to a previous work-related injury for which Mr. Grew was granted a 5% permanent partial disability award, and concluded that Dr. Guberman's recommendation should be discounted by only 5%. It thus granted an additional 3% award.

The Board of Review, however, noted that no physician specifically recommended a 3% award. Instead, it found that the final 0% impairment rating for Mr. Grew's lumbar spine, found by both Drs. Guberman and Langa, is "relevant, credible, material and reliable." (Apr. 29, 2010 Board of Review Order, p. 3.) Each physician assigned an impairment rating, but discounted it entirely to account for Mr. Grew's previous award and injury. Thus, the Board of Review concluded that Mr. Grew is not entitled to a permanent partial disability award for the lumbar spine aspect of his injury due to his "history and medical records." *Id.*

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 is so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the board's findings, reasoning and conclusions, there is insufficient support to sustain the decision. Therefore, the granting of a 2% permanent partial disability award is affirmed.

Affirmed.

ISSUED: July 15, 2011

CONCURRED IN BY:

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

DISSENTING:

Chief Justice Margaret Workman

Justice Menis E. Ketchum