

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

**DAVID S. MESSENGER,
Claimant Below, Petitioner**

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

**vs.) No. 101015 (BOR Appeal No. 2044176)
(Claim No. 2007232100)**

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

and

**KINGSFORD MANUFACTURING COMPANY,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated August 10, 2010, in which the Board affirmed a February 24, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's award of 15% permanent partial disability. The appeal was timely filed by the petitioner and a response was filed by the Kingsford Manufacturing 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. Messenger asserts the Board of Review erred in failing to grant him a permanent partial disability award of 28% based upon the independent medical examination of Dr. Joseph A. Snead. Dr. Snead opined Mr. Messenger was entitled to an award of 28% permanent partial disability award without apportionment for Mr. Messenger's pre-existing degenerative disc disease. Kingsford Manufacturing asserts Mr. Messenger was properly awarded 15% permanent partial disability in light of the pre-existing degenerative disc disease and the independent medical examinations of Drs. Bruce A. Guberman and Christopher Martin, both of whom apportioned Mr. Messenger's impairment due to the pre-existing condition.

The Office of Judges held that both Drs. Guberman and Martin placed Mr. Messenger in Category V, Rule 20 for his spinal injury, while differing regarding the opinion of apportionment for the pre-existing degenerative disc disease. (February 24, 2010 Office of Judges Order, p. 7). It further noted "[i]t is clear that Dr. Martin and Dr. Guberman were correct that the claimant had preexisting degenerative disease, which should not be included in any impairment rating for this injury." *Id.* It found Dr. Snead's report unreliable since it failed to apportion for the degenerative disc disease, which was present in the MRI performed on June 20, 2007. *Id.* The Office of Judges, too, found no basis for an additional award of permanent partial disability or for disputing the Claims Administrator's findings. The Board of Review reached the same reasonable conclusion in affirming the Office of Judges in its decision of August 10, 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 an award of 28% 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