

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**James A. Feist,  
Claimant Below, Petitioner**

**August 3, 2011  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA**

**vs.) No. 101104 (BOR Appeal No. 2044117)  
(Claim No. 2006036523)**

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

**and**

**MC Mechanical Corporation,  
Employer Below, Respondent**

**MEMORANDUM DECISION**

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated August 10, 2010, in which the Board affirmed a January 14, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's October 29, 2008 decision that Mr. Feist had been fully compensated for his injury, and granted him a 4.03% permanent partial disability award. The appeal was timely filed by the petitioner and a response was filed by the Employer. 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 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.

In its Order, the Office of Judges held that Mr. Feist was entitled to a 4.03% permanent partial disability award for occupational hearing loss. Mr. Feist disputes this finding and asserts that, per the audiograms of Dr. Roger Isla and Dr. Mary Rago, he is entitled to an increased permanent partial disability award for occupational hearing loss.

The Office of Judges noted the statutory requirements for a valid audiogram, pursuant to W. Va. Code § 85-20-47.2, which includes the consideration of non-occupational causes for any hearing loss present. The Office of Judges also noted the test-retest variability requirement of W. Va Code § 85-20-47.3 that the four frequency totals of two audiograms must be within fifteen decibels of each other and have similar audiometric curves, and that the award which provides the highest degree of impairment is the basis for a claimant's permanent partial disability award. The Office of Judges held that the March 8, 2006 audiogram conducted by Dr. Isla was not reliable because it did not indicate test reliability, and that Dr. Rago's audiogram did not meet the test-retest variability requirement in light of the other audiograms of record. The Office of Judges further held that the audiograms conducted by Dr. Wetmore and Dr. Wallace met the test-retest variability requirement, that both reports accounted for all non-occupational hearing loss, and that Mr. Feist is entitled to the higher of the two impairment ratings from these reports, which is Dr. Wetmore's 4.03% rating of September 8, 2006. The Board of Review reached the same reasoned conclusion in its August 10, 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 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 increased a permanent partial disability award for occupational hearing loss is affirmed.

Affirmed.

ISSUED: August 3, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh