

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**PERFORMANCE COAL COMPANY,
Employer Below, Petitioner**

vs.) **No. 100841 (BOR Appeal No. 2043719)
(Claim No. 2002054124)**

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

and

**VIRGIL A. JOYCE,
Claimant Below, Respondent**

FILED

June 14, 2012

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

MEMORANDUM DECISION

Petitioner, Performance Coal Company, by Paul E. Pinson, appeals the Board of Review Order granting Virgil A. Joyce an 8% permanent partial disability award following his cervical spine injury. Mr. Joyce, by John C. Blair, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 7, 2010, in which the Board affirmed an October 15, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's September 4, 2008 Order, which held Mr. Joyce fully compensated by the 6% permanent partial disability award for cervical spine impairment and 15% permanent partial disability award for lumbar spine impairment. The Office of Judges granted Mr. Joyce an additional 2% permanent partial disability award for cervical spine impairment. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Revised Rule 1(d), this matter should be, and hereby is, set for consideration under the Revised Rules of Appellate Procedure. 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 Mr. Joyce an additional 2% permanent partial disability award for cervical spine impairment over the 6%

previously granted. Performance Coal Company argues that Mr. Joyce is not entitled to the additional 2% permanent partial disability award because Dr. Clifford Carlson, the evaluator whose report forms the basis for the increased award, failed to combine impairment ratings. Had Dr. Carlson combined his 8% cervical spine impairment with the 8% lumbar spine impairment, the whole person impairment would have totaled 15%, thus leaving Mr. Joyce fully compensated by his total 20% permanent partial disability award.

The Office of Judges concluded that the preponderance of the evidence indicates that Mr. Joyce suffers 8% permanent impairment to his cervical spine, which is 2% more than his prior cervical spine award. (Oct. 15, 2009 Office of Judges Order, p. 6.) In reaching this conclusion, the Office of Judges considered the report of Dr. Carlson, mentioned above, as well as the reports of Dr. Prasadarao Mukkamala and Dr. Joseph Grady. *Id.* at 6-7. Dr. Grady, who found range of motion limitations similar to those documented by Dr. Carson, apportioned approximately one half of the findings. *Id.* at 6. No other evaluating physician made any apportionments; thus, the Office of Judges found the apportionment to be “arbitrary” due to a lack of evidence that Mr. Joyce’s prior surgery resulted in any range of motion limitations. *Id.* at 6-7. Dr. Mukkamala’s report was discounted due to his inability to make a diagnosis under Table 75 of the *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, despite his previous ability to make such a diagnosis. *Id.* at 7. Thus, the Office of Judges accorded paramount weight to Dr. Carlson’s findings and granted Mr. Joyce an additional 2% permanent partial disability award. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of June 7, 2010.

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 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 grant of an additional 2% permanent partial disability award is affirmed.

Affirmed.

ISSUED: June 14, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum

Justice Margaret L. Workman

Judge O. C. Spaulding, participating by special assignment

DISSENTING:

Justice Robin Jean Davis

Justice Thomas E. McHugh

Justice Brent D. Benjamin, disqualified