

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**KERMIT LEE BENDER, Petitioner**

**March 26, 2012**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**vs.) No. 101491 (BOR Appeal No. 2044471)**  
**(Claim No. 2004022464)**

**WEST VIRGINIA OFFICE OF  
INSURANCE COMMISSIONER and  
POINT MINING, INC., Respondent**

**MEMORANDUM DECISION**

Petitioner Kermit Lee Bender, by John Blair, his attorney, appeals the decision of the Board of Review. The West Virginia Office of Insurance Commissioner, by Jack Rife, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 25, 2010, in which the Board affirmed an April 26, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's June 18, 2008, decision finding that Mr. Bender is not entitled to a permanent partial disability award. 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. Bender is entitled to a 2% permanent partial disability award for carpal tunnel syndrome. Mr. Bender disputes this finding and asserts, per the opinion of Dr. Carlson, that he is entitled to an additional permanent partial disability award.

The Office of Judges granted Mr. Bender a 2% permanent partial disability award based on the opinion of Dr. Loimil; the Office of Judges found that Dr. Loimil's opinion coincided with the

EMG of record, which revealed mild right-sided carpal tunnel syndrome, and that his opinion is the most reliable estimation of Mr. Bender's total impairment. Mr. Bender relies on the opinion of Dr. Carlson, who recommended a 12% permanent partial disability award after determining impairment by using Table 16 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1995) and then applying W. Va. Code R. § 85-20-64.5 (2006). In *Davies v. West Virginia Office of Ins. Com'r*, 227 W. Va. 330, 708 S.E.2d 524 (2011), this Court held that W. Va. Code R. § 85-20-64.5 is invalid and cannot be applied when carpal tunnel syndrome impairment is assessed under Table 16. Therefore, the opinion of Dr. Carlson is erroneous.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon the Board's material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

**ISSUED: March 26, 2012**

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh