

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

ROBERT R. DILLON II, Petitioner

August 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0238 (BOR Appeal No. 2044873)
(Claim No. 2008044695)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
LIGHTNING CONTRACT SERVICES, INC.,
Respondent**

MEMORANDUM DECISION

Petitioner Robert R. Dillon II, by John Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Lightning Contract Services, Inc., by Matthew Williams, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated January 21, 2011, in which the Board affirmed an August 3, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's September 25, 2008, decision granting Mr. Dillon a 0% permanent partial disability award for his thoracic spine sprain/strain and an 8% permanent partial disability award for his lumbar spine sprain/strain. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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.

Mr. Dillon was employed as a ventilation man with Lightning Contract Services, Inc. On May 19, 2008, Mr. Dillon injured his thoracic and lumbar spine when he slipped on a rock. On June 10, 2008, Mr. Dillon's claim for workers' compensation benefits was accepted and the claim was held compensable for thoracic spine sprain/strain and lumbar spine sprain/strain. He has undergone

three independent medical examinations to determine the amount of permanent impairment resulting from his compensable injuries. On August 11, 2008, Dr. Mukkamala recommended a 0% permanent partial disability award for the thoracic spine sprain/strain and an 8% permanent partial disability award for the lumbar spine sprain/strain. On June 9, 2009, Dr. Guberman recommended a 6% permanent partial disability award for the thoracic spine sprain/strain and an 8% permanent partial disability award for the lumbar spine sprain/strain. On March 23, 2010, Dr. Mukkamala examined Mr. Dillon a second time and confirmed his initial recommendation of a 0% permanent partial disability award for the thoracic spine sprain/strain and an 8% permanent partial disability award for the lumbar spine sprain/strain.

In its Order affirming the September 25, 2008, claims administrator's decision, the Office of Judges held that Mr. Dillon is entitled to a 0% permanent partial disability award for the thoracic spine sprain/strain and an 8% permanent partial disability award for the lumbar spine sprain/strain. The sole issue on appeal is the amount of permanent impairment Mr. Dillon sustained as a result of his thoracic spine injury. Mr. Dillon asserts, per the opinion of Dr. Guberman, that he is entitled to a 6% permanent partial disability award for the thoracic spine sprain/strain.

The Office of Judges found that there is not convincing evidence to justify granting Mr. Dillon a permanent partial disability award for his thoracic spine injury. The Office of Judges noted that Mr. Dillon had a better range of motion in his thoracic spine in both of Dr. Mukkamala's examinations than he did in Dr. Guberman's examination. The Office of Judges further noted that there was significant improvement in Mr. Dillon's thoracic spine range of motion measurements between Dr. Guberman's June 9, 2009, examination and Dr. Mukkamala's March 23, 2010, examination, and found that this improvement is consistent with the nature of Mr. Dillon's injury. The Board of Review reached the same reasoned conclusion in its decision of January 21, 2011.

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 a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: August 14, 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