

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 11th of April, 2012, the following order was made and entered:

Bobby R. Hicks, Claimant Below,
Appellant

vs.) No. 34359

West Virginia Office of the Insurance
Commission and United Dairy, Inc.,
Charleston, Respondents Below,
Appellees

On this day, came the respondent, West Virginia Office of Insurance Commissioner Old Fund, by David L. Stuart, its attorney, and presented to the Court its motion in writing requesting that the Court withdraw its Memorandum Decision filed on March 12, 2012, and dismiss the appeal in the above-captioned proceeding, for the reasons stated therein.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said motion. The Memorandum Decision filed March 12, 2012 is hereby withdrawn and this matter is dismissed from the docket of this Court.

A True Copy

Attest: /s/ Rory L. Perry II, Clerk of Court



**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**BOBBY R. HICKS,
Claimant Below, Appellant**

**v. No. 34359 (BOR Appeal No. 76324)
(Claim No. 960004179)**

**WEST VIRGINIA OFFICE OF THE
INSURANCE COMMISSION, and
UNITED DAIRY, INC., Charleston,
Respondents Below, Appellees**

FILED

**March 12, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

MEMORANDUM DECISION

Petitioner Bobby R. Hicks, by Jerome J. McFadden, his attorney, appeals the Board of Review order denying his request for a Permanent Total Disability award. The West Virginia Office of the Insurance Commission, by Scott Nuckles, its attorney, filed a timely response.

This matter is an appeal from the West Virginia Workers' Compensation Board of Review ("BOR") filed by the Appellant, Bobby R. Hicks ("Mr. Hicks's"). By Order dated December 20, 2006, the BOR affirmed the decision of the Workers' Compensation Office of Judges ("OOJ") dated December 8, 2005, which denied Mr. Hicks' petition for an award of Permanent Total Disability ("PTD"). The basis for the OOJ's denial of Mr. Hicks' petition for a PTD award was that he failed to meet the 40% threshold in prior Permanent Partial Disability ("PPD") awards required by W.Va. Code, 23-4-6(n)(1)[1999].¹

¹In 2003, the Legislature substantially rewrote West Virginia's workers' compensation statutes, with the majority of those amendments effective July 1, 2003. One of these amendments increased the threshold, set forth in W.Va. Code § 23-4-6(n)(1), for PTD consideration from 40%

On May 13, 2011, this Court issued a Memorandum Decision finding that Mr. Hicks had a combined value of a 65% whole person impairment, and therefore, met the threshold for a PTD award. On that finding, we remanded the action with directions that the Workers' Compensation Board of Review enter an order granting Mr. Hicks PTD with an onset date of December 31, 1996. On June 13, 2011, the West Virginia Office of the Insurance Commissioner ("Commissioner") filed a Petition for Rehearing. The Commissioner argues that by statute it is entitled to make the initial determination of whether a claimant is PTD, and that the Court should defer to that statutory process. On June 28, 2011, Mr. Hicks filed his response to the Petition for Rehearing, arguing that there was no error. By order entered on July 5, 2011, this Court granted the petition for rehearing with Chief Justice Ketchum voting to refuse the petition.

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 briefs, and the record presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules.

to 50%. However, our decision in *Wampler Foods, Inc. v. Workers' Compensation Division*, 216 W.Va. 129, 602 S.E.2d 805 (2004), where we discussed the retroactive effect of the 2003 amendments, makes clear that the law in effect at the time that the first order was entered on the issue in litigation controls. In the case at bar the record reflects that the OOJ reopened Mr. Hicks' claim for PTD consideration by order dated April 1, 2003, which was before the effective date of the 2003 amendments. Accordingly, this matter is properly considered by what is colloquially referred to as "an old law case," *i.e.*, in Mr. Hicks' case, a 40% threshold is the standard, as opposed to the higher 50% threshold set by the 2003 amendments to W.Va. Code § 23-4-6(n)(1).

Mr. Hicks filed his application for PTD on June 7, 2002 — nearly ten years ago (a decade of litigation has ensued). Were this Court to adopt the Commissioner’s arguments, *i.e.*, that its entitlement to make the initial determination of PTD extends to each of the separate stages of the PTD process, a claimant could in theory (and likely in reality) be in litigation for more than a decade on a single PTD application. Such delays are not consistent with the overarching policy goals of our workers’ compensation system. In the present case, Mr. Hicks applied for PTD. The Commissioner *exercised its initial opportunity* to make a PTD determination by turning Mr. Hicks away on the errant finding that he failed to meet the requisite threshold for a PTD award. The Commissioner’s “initial finding” presented serious quality of life issues for Mr. Hicks, who has been unable to receive proper benefits because the Commissioner abused its discretion when it concluded that Mr. Hicks did not meet the threshold for PTD consideration. In issuing the May 13, 2011, Memorandum Decision, we found the record before us to be sufficiently developed for making the determination that Mr. Hicks was PTD, and for determining the onset date of his becoming PTD.

However, upon further consideration, the Commissioner is correct that by statute it is entitled to make the initial determination of whether a claimant is PTD. The broader issue of whether the Commissioner can be said to have exercised that entitlement when it finds that a claimant did not meet the threshold for PTD consideration, or the substantial due process issues that arise for claimants who have had a PTD application improperly denied, were not before this Court. For that reason, we vacate the May 13, 2011, Memorandum Decision, leaving those broader issues for future consideration. Having fully considered the record and the briefs of the parties, this matter is now mature for Memorandum Decision pursuant to Rule 12(j)(1) of the Revised Rules of Appellate Procedure.

Factual and Procedural Background

On June 7, 2002, the claimant, a salesman for the Appellee, United Dairy, Inc. (“United Dairy”), filed a petition for a PTD award. Prior to filing for the PTD award, Mr. Hicks had worked for United Dairy for 32 years.

On July 13, 1995, Mr. Hicks suffered compensable injuries to his leg and knee. Medical records describe the circumstances of the injuries as having occurred when Mr. Hicks “was getting out of [his] truck and twisted his right knee.” Mr. Hicks was initially treated conservatively, but ultimately required surgery in October 1995. The surgery performed consisted of arthroscopic medial and lateral meniscectomy, debridement of the joint, and a synovectomy. Subsequent to the surgical treatment and a period of post-operative physical therapy, Mr. Hicks returned to work. However, on December 31, 1996, Mr. Hicks’s previously injured knee “gave out”, causing him to fall. As a result of the fall, Mr. Hicks suffered a further compensable injury to his right shoulder. In March 1997, Mr. Hicks underwent arthroscopic surgery to repair the rotator cuff of his right shoulder.

Mr. Hicks has not returned to work since the second injury. The record reflects that Mr. Hicks desired to return to work following the second injury, but his treating physician would not release him to return to work. Instead, Mr. Hicks was referred for vocational rehabilitation. Medical reports indicate that “[g]iven the patient’s limited education, poor concentration, dysphoria and chronic pain issues as well as limited range of motion, the client was not felt to be a candidate for retraining. Essentially, he has been disabled since 1997.” Mr. Hicks has been awarded a total of 33% in PPD awards for the compensable injuries to his leg, knee, and shoulder. The record reflects

that in addition to these awards, he also claimed a psychiatric impairment as a consequence of the compensable injuries described above, as well as an unrelated occupational hearing loss impairment. In addition to the PPD awards and other workers' compensation claims described above, Mr. Hicks was awarded social security disability benefits following the December 31, 1996, injury to his right shoulder.

On October 25, 2004, the Interdisciplinary Examining Board (IEB) issued its final recommendations, concluding that Mr. Hicks "failed to meet the required level of whole body impairment" required for further consideration of a PTD award. On October 27, 2004, the Workers' Compensation Commission entered a protestable order reflecting the IEB's findings that Mr. Hicks had a whole body impairment of 8% for the right shoulder injury, 5% for the knee injury, and 9% psychiatric, for a combined value of 21% whole person impairment based on all compensable injuries. Mr. Hicks protested the decision, and by order dated December 8, 2005, the OOJ affirmed the IEB's findings, concluding that Mr. Hicks had failed to demonstrate that the IEB was clearly wrong in its conclusion that he failed to meet the 40% threshold for consideration of a PTD award.

Mr. Hicks appealed the OOJ's decision to the BOR, which by order dated December 20, 2006, adopted as its own the OOJ's findings of fact and conclusions of law, and affirmed the OOJ's decision. It is from the BOR's order affirming the OOJ's decision that Mr. Hicks appeals.

Discussion

The issue in this case is whether or not the claimant has met the threshold for consideration of a PTD award. Mr. Hicks' claim was rejected on the basis that he failed to meet the required

statutory threshold for such consideration. W.Va. Code § 23-4-6(n)(1)[1999], provides, in relevant part, that for all requests of a PTD award made on or after May 12, 1995, a claimant must have been awarded the sum of 40% in prior PPD awards, have suffered an occupational injury or disease which results in a finding that the claimant has suffered a medical impairment of 40%, or have sustained a 35% statutory disability, pursuant to W.Va. Code § 23-4-6(f). On appeal, Mr. Hicks essentially argues that the IEB failed to properly weigh the evidence before it. Mr. Hicks particularly argues that the IEB improperly discounted, or discredited, a report prepared by Dr. Paul Bachwitt dated January 23, 1996.

In his argument, Mr. Hicks observes that Dr. Bachwitt is not known for giving liberal evaluations of workers' compensation claims, and therefore the IEB should have accepted Dr. Bachwitt's Independent Medical Evaluation ("IME") finding that Mr. Hicks suffered a 22% whole person impairment for his right knee injury. Dr. Bachwitt found Mr. Hicks to have 4% PPD from the surgery to his knee, 3% PPD for the onset of arthritis, 8% PPD for lack of extension, and 8% PPD for the lack of flexion. Notable in Dr. Bachwitt's IME report is his response to the following questions on the disability evaluation form:

Question: Is the impairment expected to be progressive?

Dr. Bachwitt's response: It very well may be. Also, his treating physician mentions a possible total knee arthroplasty in the future. The crepitus is the most likely cause of his continued effusion.

Question: Would the claimant benefit from vocation rehabilitation?

Dr. Bachwitt's response: I would hope he might. He does state a desire to return to work. Unless his motion improves, *I do not think this would be reasonable.* (Emphasis added).

In a report dated February 22, 1999, Dr. Robert P. Kropac, an orthopedic surgeon, evaluated Mr. Hicks and found him to have a residual 11% whole person impairment following the surgical repair of Mr. Hicks' right rotator cuff. In a report dated April 28, 2003, Dr. Marion Douglas, a psychiatrist, evaluated Mr. Hicks and found him to be suffering from mild-to-moderate dysphoria, irritability, poor concentration, lack of motivation, increased sleep, and a sense of futility. Dr. Douglas made an Axis I diagnosis of a major depressive disorder and mood disorder secondary to Mr. Hicks' work-related injuries and chronic pain. Dr. Douglas recommended a 35% whole person psychiatric impairment.

In a separate IME conducted on April 28, 2004, Dr. Paul Forberg recommended a 5% whole person impairment for Mr. Hick's right knee and an 8% whole person impairment for his right shoulder, for a combined whole person impairment rating of 13%. In response to questions on the disability evaluation form, Dr. Forberg noted that Mr. Hicks was receiving social security disability benefits and had not worked since the injury to his right shoulder. Dr. Forberg also noted that while an earlier functional capacity evaluation conducted on March 16, 2004, suggested a light PDL level of work, that Mr. Hicks's "condition is chronic in nature and [he] would have poor rehabilitative potential at this time." Dr. Forberg also noted that he did not "feel a rehabilitative assessment will be useful in returning [Mr. Hicks] to active employment. He is 67 years old and retired."

On August 14, 2008, Mr. Hicks was referred for an IME with Dr. Syed Zahir. Dr. Zahir found Mr. Hicks to have internal derangement of the right knee with torn medial meniscus and lateral meniscus right knee, early degenerative arthritis of the right knee, and a rotator cuff tear of the right shoulder. Dr. Zahir opined as follows:

I believe this patient does have discomfort in his right knee, but he does not have significant effusion. He is doing well as far as the right knee is concerned, but he has been having stiffness in the right shoulder and has been having pain and discomfort in the right shoulder. The patient still has a considerable amount of stiffness and limitation of motion in the right shoulder. . . . Based upon the present findings, the patient has full motion of both knees. He has equal motion. There is no evidence of any effusion or ligamentous laxity.

Dr. Zahir recommended a 10% whole body impairment for Mr. Hicks' right knee. Dr. Zahir further opined that he did not believe Mr. Hicks "would be able to do heavy manual work since he was involved in delivering milk and driving a truck" and further that the "condition of [Mr. Hicks's] right knee may deteriorate over the course of years" and that while Mr. Hicks' weight may have some secondary contribution to the condition of his knee, "[i]t is likely that he may need to have more surgical intervention done as far as the right knee is concerned." Dr. Zahir did not rate Mr. Hicks' right shoulder, instead commenting that "he requires further follow-up care and therapy . . . and should be evaluated again in a period of four to six months."

We have previously held that "[a] claimant in a workmen's compensation case must bear the burden of proving his claim but in doing so it is not necessary to prove to the exclusion of all else the causal connection between the injury and the employment." Syllabus Point 2, *Sowder v. State Workmens' Compensation Comm'*, 155 W.Va. 889, 189 S.E.2d 674 (1972). We have further noted that this Court will not reverse the BOR unless we determine that it is in clear violation of constitutional or statutory provision, is 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. *Bowers v. West Virginia Office of Ins. Comm'nr*, 224 W.Va. 398, 402, 686 S.E.2d

49, 53 (2009). As we further noted in *Bowers*, “[i]n other words, ‘[w]hen it appears from the proof upon which the Workmen’s Compensation [Board of Review] acted that its finding was plainly wrong an order reflecting that finding will be reversed and set aside by this Court.’ Syl. pt. 5, *Bragg v. State Workmen's Comp. Comm’nr*, 152 W.Va. 706, 166 S.E.2d 162 (1969).” *Id.* at 402, 686 S.E.2d at 53.

In the appeal before us, Mr. Hicks had been awarded a total sum of 33% in prior PPD awards for the injuries to his knee and shoulder. There is reliable evidence in the record, in addition to those prior awards, that Mr. Hicks also has a substantial psychiatric impairment as a consequence of his compensable injuries. This psychiatric impairment has manifested in the form of depression as a consequence of chronic pain and the life changes he was forced to make as a result of his compensable injuries. Significant to the issue before us is that the life changes include the fact that Mr. Hicks is unable to return to work despite a desire to do so.²

Based upon the record before us, we find the report of Dr. Bachwitt to be credible evidence that Mr. Hicks suffered a 22% whole person impairment as a consequence of the injury to his right knee. We further find that credible evidence establishes that Mr. Hicks has an 8% whole person impairment to his right shoulder. Finally, the credible evidence establishes that Mr. Hicks suffers a 35% whole person psychiatric impairment relevant to the compensable injuries discussed in this Memorandum Decision. These impairments have a combined value of a 65% whole person impairment.

²The record also reflects that Mr. Hicks may have an occupational hearing loss claim.

Accordingly, we find that Mr. Hicks meets the statutory whole body impairment threshold found in W.Va. Code § 23-4-6(n)(1). Having satisfied the first and second prongs of the three-step test for PTD eligibility, this claim is ripe for additional evaluation under the third prong. We therefore remand this case to the Reviewing Board, or other reviewing body, to determine whether Mr. Hicks is entitled to a PTD award within the meaning of W. Va. Code § 23-4-6(n)(2).

Reversed and Remanded.

ISSUED: March 12, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Robin Jean Davis