

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**AAA MOBILE HOMES, INC.,
Employer Below, Petitioner**

vs.) No. 16-0523 (BOR Appeal No. 2051255)
(Claim No. 2014004300)

**FRANCIS L. FLUHARTY JR.,
Claimant Below, Respondent**

FILED

May 5, 2017
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner AAA Mobile Homes, Inc., by Timothy E. Huffman, its attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Francis L. Fluharty Jr., by Jonathan C. Bowman, its attorney, filed a timely response.

The issue on appeal is whether Mr. Fluharty is entitled to a permanent total disability award. The claims administrator granted a permanent total disability award on February 19, 2016. The Office of Judges held on March 25, 2016, that AAA Mobile Homes, Inc.'s appeal would not be acknowledged. The Order was affirmed by the Board of Review on May 4, 2016. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and 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 no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Fluharty, a truck driver/equipment operator, suffered an amputation of the left leg at the thigh in the course of his employment on August 6, 2013. On February 19, 2016, the Permanent Total Disability Review Board issued a protestable decision granting Mr. Fluharty a permanent total disability award. It concluded that he met the 50% threshold for impairment. It reversed an earlier decision denying a permanent total disability award and found that Mr. Fluharty has no vocational potential due to continuing problems with his prosthetic and evidence submitted by Patricia Bailey, a psychologist, regarding limited attention and concentration.

The claims administrator granted Mr. Fluharty a permanent total disability award on February 19, 2016. AAA Mobile Homes, Inc., protested the decision and on March 25, 2016, the Office of Judges refused to acknowledge the protest. It held that AAA Mobile Homes, Inc.'s, protest would not be acknowledged pursuant to West Virginia Code § 23-5-1 (2008) which provides three situations in which an employer may protest. Decisions that may be protested by the employer are those incorporating findings of the Occupational Pneumoconiosis Board, decisions made by the Insurance Commissioner acting as administrator of claims involving funds created in West Virginia Code § 23-2, or decisions made pursuant to West Virginia Code § 23-4-7a (c)(1) (2005).

The Board of Review affirmed the Office of Judges' Order on May 4, 2016. It found that the claims administrator's decision does not provide any of the scenarios mentioned in West Virginia Code § 23-5-1. Further, the Court has already addressed the issue in *Performance Coal Company v. Hoge*, No. 13-0369 (June 27, 2014) (memorandum decision) and *Lowe's Home Centers, Inc. v. Gwinn*, No. 13-1291 (Nov. 9, 2015) (memorandum decision), in which we held that the employer had no right to protest the claims administrator's grant of a permanent total disability award. The Board of Review concluded that the facts in the instant case are essentially the same as in *Hoge* and *Gwinn*. It therefore held that the Office of Judges properly refused to acknowledge AAA Mobile Homes, Inc.'s, protest.

After review, we agree with the reasoning and conclusions of the Board of Review. West Virginia Code § 23-5-1 very clearly provides the circumstances under which an employer may protest a decision of the claims administrator. This Court has previously held that the grant of a permanent total disability award is not such a circumstance. The Office of Judges was correct to refuse to acknowledge the protest and the Board of Review was correct to affirm the Order.

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: May 5, 2017

CONCURRED IN BY:

Chief Justice Allen H. Loughry II
Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Elizabeth D. Walker