

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

KEVIN D. BLANKENSHIP,
Claimant Below, Petitioner

vs.) No. 100820 (BOR Appeal No. 2043716)
(Claim No. 2005011817)

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent

and

IRON HORSE TRANSPORT,
a/k/a K A T ENTERPRISE,
Employer Below, Respondent

FILED

July 25, 2011

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

MEMORANDUM DECISION

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 20, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's February 6, 2007 Order, which granted a 6% permanent partial disability award (representing 5% cervical spine impairment and 1% right shoulder impairment). The Office of Judges granted a 9% permanent partial disability award, which represented an 8% award for cervical impairment and 1% award for right shoulder impairment. The Office of Judges also reversed the claims administrator's October 21, 2008 Order, which granted a 2% permanent partial disability award for Mr. Blankenship's left shoulder impairment. The Office of Judges granted a 7% permanent partial disability award for his left shoulder impairment. The appeal was timely filed by the petitioner. 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, the Court is of the opinion that this case 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.

The Board of Review affirmed the granting of an 8% permanent partial disability award for Mr. Blankenship's cervical impairment, a 1% award for right shoulder impairment, and a 7% award for left shoulder impairment. Mr. Blankenship argues that he is entitled to an additional 3% award for his right shoulder impairment, as found by Dr. Clifford Carlson. Mr. Blankenship states that the Office of Judges employed a "majority rules" approach in granting a 1% award due to the fact that Dr. Andrew E. Landis and Dr. Paul Bachwitt each found 1% impairment, but Dr. Carlson found 4% impairment. Mr. Blankenship argues that Dr. Carlson has not deviated from the AMA *Guides* and that he is entitled to the impairment rating recommended in Dr. Carlson's report.

The Office of Judges noted that Dr. Bachwitt's report was most recent in time. (Oct. 20, 2009 Office of Judges Order, p. 5.) The Office of Judges also considered that Dr. Bachwitt's right shoulder impairment findings were in line with Dr. Landis's. *Id.* at p. 6. Finally, due to Dr. Carlson's untimely death and inability to sit for a deposition, Dr. Bachwitt was provided with Dr. Carlson's report and asked to comment upon the findings within the report. Dr. Bachwitt was careful and deliberate in his measurements, but he could not replicate Dr. Carlson's findings. Due to the fact that Dr. Carlson's findings were inconsistent with Dr. Landis's and Dr. Bachwitt's despite careful attempts by Dr. Bachwitt to replicate, the Office of Judges found Dr. Bachwitt's recommendation most persuasive. *Id.* 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 denial of the petitioner's request for an additional 3% permanent partial disability award is affirmed.

Affirmed.

ISSUED: July 25, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh