

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

July 21, 2011

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

**JOSEPH S. SMITH,
Claimant Below, Petitioner**

**vs.) No. 100921 (BOR Appeal No. 2044000)
(Claim No. 2007219336)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER,
Commissioner Below, Respondent**

and

**HUNTINGTON ALLOYS CORPORATION,
Employer Below, Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated June 29, 2010, in which the Board affirmed a December 21, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's award of 8% permanent partial disability. The appeal was timely filed by the petitioner and a response was filed by Huntington Alloys Corporation. 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, response, 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 reaching its conclusion that Petitioner was entitled to an additional award of permanent partial disability above the 8% granted by the Claim's Administrator the Office of Judges determined Petitioner suffered a prior injury to his thoracic spine and should be placed into Category I regarding that impairment. (December 21, 2009 Office of Judges Order, p. 4). Mr. Smith asserts Dr. Hess improperly categorized him into Category I for his thoracic spine injury and improperly recommended a 0% impairment rating. Additionally, Mr. Smith asserts Dr. Hess improperly categorized his lumbar spine injuries into Category II, failed to complete a low back examination form, and application of Tables 85-20-C and 85-20-D serve as *de facto* improper reduction of benefits. The OoJ held the recommendation of Dr. Hess regarding the thoracic spine was proper in light of the history of prior problems with the thoracic spine. *Id.* It further noted Dr. Hess based his recommendation for the lumbar spine on a single injury and that this is a plausible form of reasoning and is not a mistake as a matter of law as there is no competing medical examination or medical opinion of any kind against Dr. Hess' recommendation. The Office of Judges, too, found no basis for additional permanent partial disability, or for disputing the Claims Administrator's findings. The Board of Review reached the same reasoned conclusions in affirming the Office of Judges in its decision of June 28, 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 is based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the denial of the petitioner's request for additional permanent partial disability is affirmed.

Affirmed.

ISSUED: July 21, 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