

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**WEST VIRGINIA OFFICES OF THE INSURANCE
COMMISSIONER, Petitioner**

**vs.) No. 100987 (BOR Appeal No. 2043892)
(Claim No. 2005031282)**

**RICHARD L. ROBERTSON and CCBCC, INC.,
Respondent**

FILED

**December 7, 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's Final Order dated July 6, 2010, in which the Board affirmed and modified a November 20, 2009, Order of the Workers' Compensation Office of Judges. The Board of Review affirmed the Office of Judges's conclusion, but it modified the Order to reflect that Mr. Robertson is entitled to a 24% permanent partial disability award based on the preponderance of the evidence standard. In the Office of Judges's Order, it reversed the claims administrator's November 28, 2008, Order, which granted Mr. Robertson a 7% permanent partial disability award. The appeal was timely filed by the petitioner, and Mr. Robertson filed a response. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Revised Rule 1(d), this matter should be, and hereby is, set for consideration under the Revised Rules of Appellate Procedure. Having considered the parties' submissions 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 Office of Judge's Order, which granted Mr. Robertson a 24% permanent partial disability award based upon the reports of Dr. Bruce A. Guberman and Chiropractor Kominsky, who each recommended 24% impairment. The Office of Judges also engaged in an extensive analysis of W. Va. Code R. § 85-20-64.5, which provides for carpal tunnel syndrome impairments of 0% to 6% per hand; however, the Board of Review did not adopt the Office of Judges's reasoning in awarding a 24%

permanent partial disability award. Rather, it affirmed only the conclusion and modified the Board of Review's Order to reflect that Mr. Robertson is entitled to a 24% award based on the preponderance of the evidence. Nonetheless, the Insurance Commissioner devoted the entirety of its Petition to arguing against the reasoning employed by the Office of Judges. The decision on appeal is that of the Board of Review, however.

Mr. Robertson was evaluated by four physicians to assess his impairment level following several work-related repetitive-use injuries: A. E. Landis, M.D.; Bruce A. Guberman, M.D.; Michael J. Kominsky, D.C.; and Paul Bachwitt, M.D. Both Dr. Guberman and Chiropractor Kominsky recommended 24% impairment. Dr. Landis recommended 7% impairment, but he did not provide an impairment rating for ulnar entrapment. The remaining three physicians did provide an impairment rating for this condition.

Dr. Guberman and Chiropractor Kominsky also found higher impairment ratings for Mr. Robertson's carpal tunnel syndrome than did the remaining physicians, but there is no evidence to suggest that they did not properly apply the *AMA Guides* in calculating this impairment. Although Dr. Bachwitt argued that the physicians employed a Table that is no longer "preferred" for rating carpal tunnel syndrome, the *AMA Guides* specifically approve use of this Table. Thus, the Board of Review found that a preponderance of the evidence supports the grant of a 24% permanent partial disability award.

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 grant of a 24% permanent partial disability award is affirmed.

Affirmed.

ISSUED: December 7, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Menis E. Ketchum

Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin