

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**JAMES HOWARD VANCE JR., Petitioner**

**November 15, 2011**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**vs.) No. 101243 (BOR Appeal No. 2044335)**  
**(Claim No. 2008004783)**

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER and**  
**PREMIUM ENERGY, LLC, Respondent**

**MEMORANDUM DECISION**

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated September 2, 2010, in which the Board affirmed a March 19, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's December 16, 2008, 4% permanent partial disability award, and granted Mr. Vance a 5% permanent partial disability award. The appeal was timely filed by the petitioner and a response was filed by the Employer. 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 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 its Order, the Office of Judges held that Mr. Vance was entitled to a 5% permanent partial disability award. Mr. Vance disputes this finding and asserts, per the opinion of Dr. Poletajev, that he is entitled to an additional 8% permanent partial disability award, for a total award of 13%.

In making its decision, the Office of Judges found that the opinion of Dr. Poletajev was flawed because he failed to attribute any of Mr. Vance's impairment to the pre-existing back pain and radiculopathy that are well documented in Mr. Vance's medical record. The Office of Judges relied upon W. Va. Code § 23-4-9b, which provides:

Where an employee has a definitely ascertainable impairment resulting from an occupational or a nonoccupational injury, disease or any other cause, whether or not disabling, and the employee thereafter receives an injury in the course of and resulting from his or her employment, unless the subsequent injury results in total permanent disability within the meaning of section one, article three of this chapter, the prior injury, and the effect of the prior injury, and an aggravation, shall not be taken into consideration in fixing the amount of compensation allowed by reason of the subsequent injury. Compensation shall be awarded only in the amount that would have been allowable had the employee not had the preexisting impairment. Nothing in this section requires that the degree of the preexisting impairment be definitely ascertained or rated prior to the injury received in the course of and resulting from the employee's employment or that benefits must have been granted or paid for the preexisting impairment. The degree of the preexisting impairment may be established at any time by competent medical or other evidence.

The Office of Judges further found that Dr. Condaras correctly attributed a portion of Mr. Vance's impairment to his pre-existing conditions. The Office of Judges found that Dr. Condaras properly apportioned one-half of the impairment he ascertained to pre-existing conditions before applying Rule 20, and that Mr. Vance was therefore entitled to the 5% permanent partial disability award recommended by Dr. Condaras. The Board of Review reached the same reasoned conclusion in its decision of September 2, 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 decision of the Board of Review is affirmed.

Affirmed.

**ISSUED: November 15, 2011**

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Thomas E. McHugh

**DISSENTING:**

Justice Menis E. Ketchum