

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

GARY W. DEAN, Petitioner

vs.) No. 101259 (BOR Appeal No. 2044233)
(Claim No. 2007211900)

FILED

November 8, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
ALCAN ROLLED PRODUCTS - RAVENSWOOD, LLC,
Respondent

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated September 2, 2010, in which the Board affirmed an February 10, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August 11, 2008, Order, which granted Mr. Dean no permanent partial disability award. The appeal was timely filed by the petitioner, and Alcan Rolled Products - Ravenswood, LLC 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 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 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 no permanent partial disability following a compensable injury to Mr. Dean's left wrist, knees, and abdomen. Mr. Dean argues that he is entitled to an 11% permanent partial disability award based upon the report of Dr. Bruce A. Guberman. Mr. Dean contends that Dr. Guberman's report is more thorough than those completed by Drs. P. B. Mukkamala and Marsha Bailey, which found no impairment. Further, Mr. Dean argues that Dr. Guberman's

failure to mention his non-compensable wrist fracture in calculating his wrist impairment is a non-issue as Dr. Guberman attributed all of the found impairment to Mr. Dean's compensable injury.

The Office of Judges observed first that Dr. Guberman failed to even mention Mr. Dean's pre-existing left wrist fracture in computing left wrist impairment. (Feb. 10, 2010, Office of Judges Order, p. 4.) Dr. Guberman neither stated the impact of the wrist fracture on the impairment nor explained that the fracture was not a factor. *Id.* Based upon the report's silence as to this "important consideration," the Office of Judges ascribed it less weight in considering left wrist impairment than the reports of Drs. Mukkamala and Bailey. *Id.*

Furthermore, the Office of Judges noted that Dr. Mukkamala evaluated Mr. Dean prior to Dr. Guberman, and Dr. Bailey evaluated Mr. Dean subsequent to Dr. Guberman. *Id.* at pp. 4-5. Thus, any impairment observed by Dr. Guberman was not permanent due to its non-existence prior to and after Dr. Guberman's evaluation. Thus, the Office of Judges found Drs. Mukkamala's and Bailey's reports deserving of more evidentiary weight and granted Mr. Dean no permanent partial disability award. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its September 2, 2010, decision.

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 based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the grant of no permanent partial disability award is affirmed.

Affirmed.

ISSUED: November 8, 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