

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

February 17, 2012

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

BILLY J. MCCLANAHAN, Petitioner

**vs.) No. 101393 (BOR Appeal No. 2044486)
(Claim No. 2007221174)**

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER
NICHOLS CONSTRUCTION, LLC, Respondent**

MEMORANDUM DECISION

Petitioner Billy McClanahan, by Robert Williams, his attorney, appeals the decision of the Board of Review. Nichols Construction, LLC, by Gary Nickerson, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated October 13, 2010, in which the Board affirmed an April 2, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 17, 2009, decision granting Mr. McClanahan an 8% permanent partial disability award. 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. McClanahan is not entitled to an increase in his 8% permanent partial disability award. Mr. McClanahan disputes this finding and asserts, per the opinion of Dr. Guberman, that he is entitled to an additional 4%

permanent partial disability award.

The Office of Judges found that Dr. Guberman's impairment rating was incorrect, because his rating was based on symptoms of radiculopathy, which is not consistent with Mr. McClanahan's medical record. The Office of Judges also found that Dr. Guberman did not follow the instructions of the American Medical Association's *Guides to the Evaluation of Permanent Impairment, 4th Edition* when apportioning between preexisting impairment and impairment resulting from the compensable injury. The Office of Judges found that the reports of Dr. Werntz and Dr. Martin are in substantial agreement and in compliance with the American Medical Association's *Guides*. The Board of Review reached the same reasoned conclusion in its decision of October 13, 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: February 17, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Chief Justice Menis E. Ketchum