

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**JOSEPH W. TOLNAY, Petitioner**

**March 29, 2012**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**vs.) No. 101446 (BOR Appeal No. 2044454)**  
**(Claim No. 9800546713)**

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER and**  
**U. S. STEEL MINING CO., LLC, Respondent**

**MEMORANDUM DECISION**

Petitioner, Joseph W. Tolnay, by John C. Blair, his attorney, appeals the Board of Review order denying an additional award of 5% permanent partial disability. U. S. Steel Mining Company, LLC, by Barney W. Frazier, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated October 13, 2010, in which the Board affirmed an April 16, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's Order denying Mr. Tolnay's request for an additional award of 5% permanent partial disability. Mr. Tolnay was previously awarded an 8% permanent partial disability award for the lumbar spine injury. 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.

The Board of Review found Mr. Tolnay failed to present any medical evidence establishing by a preponderance of the evidence that he is entitled to an additional award of 5% permanent partial disability. Mr. Tolnay asserts the relevant evidence contained in Dr. Clifford H. Carlson's independent medical evaluation establishes he suffers from an aggravation or progression of his compensable lumbar spine injury. On the other hand, U. S. Steel Mining Co. asserts the reports of Dr. A. E. Landis and Dr. Prasadarao Mukkamala do not agree with the findings of radiculopathy in

Dr. Carlson's report and neither found Mr. Tolnay suffers from an aggravation or progression of his compensable lumbar spine injury.

In its Order affirming the claims administrator Order, the Office of Judges noted there were major inconsistencies in the opinions of the evaluators over the years. "Dr. Carlson sees radiculopathy that is not identified by Dr. Landis or Dr. Mukkamala." "The more time passes from the compensable injury in 1998, the more weight is given logically to the proposition that radiculopathy, if any, was not caused by the compensable injury." It held the preponderance of the evidence supports the ruling that there has been no progression or aggravation of Mr. Tolnay's lumbar spine injury. The Office of Judges, too, found no basis for granting Mr. Tolnay's request for an additional award of 5% 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 October 13, 2010.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the denial of Mr. Tolnay's request for an additional award of 5% permanent partial disability is affirmed.

Affirmed.

**ISSUED: March 29, 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