

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**April 13, 2012**

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

**ROBERT W. AGOSTINELLI, Petitioner**

**vs.) No. 101575 (BOR Appeal No. 2044363)  
(Claim No. 2005015401)**

**WEST VIRGINIA OFFICE OF  
INSURANCE COMMISSIONER and  
COLUMBIA SALES, INC., Respondent**

**MEMORANDUM DECISION**

Petitioner Robert W. Agostinelli, by Jonathan Bowman, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order granting a 23% permanent partial disability award for the lumbar spine injury.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated November 8, 2010, in which the Board affirmed a March 26, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's October 23, 2008, Order granting a 23% 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.

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.

The Board of Review affirmed the holding that Mr. Agostinelli had been fully compensated for his lumbar spine injury by a 23% permanent partial disability award. Mr. Agostinelli disagrees and asserts that he is entitled to an additional 3% permanent partial disability award.

In affirming the claims administrator's permanent partial disability award, the Office of Judges held that the preponderance of the evidence did not prove that the petitioner was entitled to an additional award. The Office of Judges noted that the past radiculopathy with no current complaints of numbness or weakness was not sufficient to place the petitioner in a more severe

category of lumbar impairment. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its decision of November 8, 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 November 8, 2010, Order of the Board of Review is affirmed.

Affirmed.

**ISSUED: April 13, 2012**

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Margaret L. Workman

Justice Thomas E. McHugh