

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

FREDERICK LAMBERT, Petitioner

July 26, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-0062 (BOR Appeal No. 2044411)
(Claim No. 2008007155)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
EASTERN ASSOCIATED COAL CORPORATION,
LLC, Respondent**

MEMORANDUM DECISION

Petitioner, Frederick Lambert, by Stephen New, his attorney, appeals the Board of Review Order granting him 10% permanent partial disability. Eastern Associated Coal Corporation, LLC, by Robert J. Busse, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated December 8, 2010, in which the Board affirmed an April 12, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's Order granting 10% permanent partial disability for Mr. Lambert's right shoulder injury. 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, 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.

On August 9, 2007, Mr. Lambert attempted to pick up a live electrical wire with wet gloves, at which time he was electrocuted and a co-worker attempted to break the link by hitting Mr. Lambert with a crib block. As a result, Mr. Lambert suffered a dislocated right shoulder. Following a right shoulder reduction, Mr. Lambert participated in physical therapy during which it was found Mr. Lambert had improvement of his range of motion.

Dr. Prasadarao B. Mukkamala evaluated Mr. Lambert pursuant to an independent medical evaluation on October 14, 2008, at which time Mr. Lambert was found to have 10% impairment for the right shoulder injury. On July 2, 2009, Dr. Bruce A. Guberman evaluated Mr. Lambert and opined 13% impairment for the right shoulder and 8% for the cervical spine if it should be ruled compensable. A final evaluation was conducted by Dr. Paul Bachwitt, who found 6% impairment for the right shoulder injury.

The Office of Judges determined the chief difference between the impairment ratings for the right shoulder injury revolved around the rating for the resection. Dr. Bachwitt was the only evaluating physician to find insufficient removal for an impairment rating pursuant to American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), while both Dr. Mukkamala and Dr. Guberman found sufficient impairment to rate the injury. Thereafter, the Office of Judges reviewed the impairment ratings and found Dr. Guberman's assessment excessive when considering the timing of the other evaluations. Dr. Bachwitt's report was also found to provide marginal evidence since the report failed to properly consider the resection in assigning impairment. Dr. Mukkamala's report was found dispositive in determining Mr. Lambert's appropriate permanent partial disability. The Office of Judges also found no basis for awarding additional permanent partial disability or for disputing the claims administrator's findings. The Board of Review reached the same reasonable conclusion in affirming the Office of Judges in its decision of December 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 Court affirms the Board of Review Order granting Mr. Lambert 10% permanent partial disability for the right shoulder injury.

Affirmed.

ISSUED: July 26, 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