

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

May 8, 2013

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

**ALEX GLEN HENSLEY JR.,**  
**Claimant Below, Petitioner**

vs.) **No. 11-0501** (BOR Appeal No. 2045085)  
(Claim No. 2008048750)

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER,**  
**Commissioner Below, Respondent**

**and**

**BRODY MINING, LLC,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Alex Glen Hensley Jr., by John C. Blair, appeals the decision of the West Virginia Workers' Compensation Board of Review awarding a 19% permanent partial disability award. Brody Mining, LLC, by Steven K. Wellman, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 24, 2011, in which the Board affirmed a September 14, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's August 4, 2009, order granting a 14% permanent partial disability award and granted Mr. Hensley a 19% 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 Rules of Appellate Procedure.

Mr. Hensley sustained a compensable injury to his lumbar spine, knees, ankles, and feet during a rock fall on June 24, 2008. He sustained an L1 compression fracture and a non-displaced left distal fibula fracture. He also underwent arthroscopic surgery of his right knee.

After reaching maximum medical improvement, he was evaluated by William Hoh, M.D. Dr. Hoh found 8% impairment to Mr. Hensley's lumbar spine, 3% impairment of his right lower extremity, and 3% impairment of his left lower extremity. These values were combined for 14% whole person impairment.

On August 4, 2009, the claims administrator granted Mr. Hensley a 14% permanent partial disability award based upon Dr. Hoh's report. Mr. Hensley appealed this order and underwent an evaluation by Victor Poletajev, D.C. on November 10, 2009. Dr. Poletajev found 12% impairment to Mr. Hensley's right knee, 2% impairment to his left ankle and foot, 10% impairment to his right ankle and great toe, and 13% impairment to his lumbar spine. These values were combined to reach 32% whole person impairment.

Finally, Mr. Hensley was evaluated by P. B. Mukkamala, M.D. on February 23, 2010. Dr. Mukkamala found 13% impairment to Mr. Hensley's lumbar spine and 4% impairment to his right knee, which combined for 19% whole person impairment arising out of the subject compensable injury.

On April 2, 2010, Rebecca Thaxton, M.D. reviewed Mr. Hensley's claim. Dr. Thaxton found an error in Dr. Hoh's report resulting from the misapplication of Rule 20; accordingly, she opined that Dr. Mukkamala's report contained more credible findings as between Dr. Hoh and Dr. Mukkamala's reports. She did not consider Dr. Poletajev's findings. Based upon Dr. Mukkamala's report and Dr. Thaxton's claim review, the Office of Judges reversed the claims administrator and granted Mr. Hensley a 19% permanent partial disability award. This decision was affirmed by the Board of Review on February 24, 2011.

Mr. Hensley thereafter appealed the Board of Review Order, and he argues that Dr. Poletajev's report should form the basis of his permanent partial disability award. Although Dr. Mukkamala stated that Dr. Poletajev's calculations represent "an exaggerated impairment" due in part to his usage of two impairment ratings for Mr. Hensley's right knee instead of one range of motion impairment, Mr. Hensley notes that the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993) state that "[i]n some instances . . . a combination of two or three methods may be required."

On appeal, the Office of Judges noted one need not even consider the propriety of utilizing and combining two rating methods in reaching right knee impairment. Rather, because neither Dr. Hoh nor Dr. Mukkamala, who conducted his evaluation latest in time, found the right knee impairment reportedly found by Dr. Poletajev, the impairment must not be permanent in nature. The Office of Judges reversed the claims administrator's decision and awarded Mr. Hensley a 19% permanent partial disability award and reasoned that Dr. Mukkamala's report is entitled to greater evidentiary weight. The Board of Review affirmed the granting of the 19% permanent partial disability award. We agree with the Board of Review's decision.

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 so clearly wrong based upon the evidentiary record that when all inferences are resolved in favor of the Board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: May 8, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin

Justice Robin Jean Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II