

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

May 8, 2013

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

**MICHAEL A. SMITH,  
Claimant Below, Petitioner**

vs.) **No. 11-0511** (BOR Appeal No. 2045356)  
(Claim No. 2009087436)

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

**and**

**DYNAMIC ENERGY,  
Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Michael A. Smith, by William B. Gerwig III, appeals the decision of the West Virginia Workers' Compensation Board of Review granting an 8% permanent partial disability award. Dynamic Energy, by Lisa Warner Hunter, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 3, 2011, in which the Board affirmed a November 29, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's November 25, 2009, order granting 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.

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. Smith sustained a compensable injury to his left hip and lower back during a fall at work on April 13, 2009. He was subsequently evaluated by Dr. Paul Bachwitt, who found 10%

permanent partial impairment to Mr. Smith's lumbar spine. This value, however, was reduced pursuant to West Virginia Code of Rules § 85-20-C ("Table C"), which sets forth permanent partial disability ranges for lumbar spine impairments. Based upon Dr. Bachwitt's examination findings, Mr. Smith was placed in "Lumbar Category II," which corresponds to a 5%-8% impairment; accordingly, Dr. Backwitt reduced Mr. Smith's impairment to 8%.

Mr. Smith argues that this reduction was improper and that Table C is violative of West Virginia Code § 23-4-6(i). West Virginia Code § 23-4-6(i) requires that "the degree of permanent disability other than permanent total disability shall be determined exclusively by the degree of whole body medical impairment that a claimant has suffered." Additionally, "[o]nce the degree of medical impairment has been determined, that degree of impairment shall be the degree of permanent partial disability that shall be awarded to the claimant." *Id.* Thus, Mr. Smith argues that the reduction mandated by Table C was improper.

In affirming the grant of an 8% permanent partial disability award, the Office of Judges cited to *Simpson v. West Virginia Office of Ins. Comm'r*, 223 W. Va. 495, 678 S.E.2d 1 (2009). The Office of Judges found Mr. Smith's argument that Table C is inconsistent with statutory law unavailing. The *Simpson* Court held that

Table § 85-20-C enumerates '[c]riteria for [r]ating [i]mpairment [d]ue to [l]umbar [s]pine [i]njury,' assigning impairment ratings to be used in calculating the amount of a claimant's PPD award for a work-related lumbar spine injury. In its directive to the Board of Managers 'to promulgate a rule establishing the process for . . . awards of disability,' the Legislature further specified that such rule should 'include [ ] . . . [a] range of permanent partial disability awards for common injuries.' W. Va. Code § 23-4-3b(b). The title of Table § 85-20-C is 'PPD Ranges for Lumbar Spine Impairments,' and the Table, itself, proceeds to define ranges of PPD awards for lumbar spine injuries. In promulgating Table § 85-20-C, the Board of Managers adhered to the stated legislative intent expressed in the enabling statute, W. Va. Code § 23-4-3b(b), and adopted guidelines for the rating of permanent partial disability awards as the Legislature had instructed it to do. The Board of Manager's promulgation of Table 85-20-C directly complied with the Legislature's express statement of intent contained in W. Va. Code § 23-4-3b(b), and the language employed in Table § 85-20-C specifically reiterates such legislative intent in effectuating its purpose. Thus, Table § 85-20-C comports with the express intent of the Legislature and is not inconsistent therewith. . . . Accordingly, we hold that W. Va. C.S.R. Table § 85-20-C (2004) is valid and is a proper exercise of the rule-making authority delegated to the Workers' Compensation Board of Managers by the Legislature in W. Va. Code § 23-4-3b(b) (2005)[.]

*Id.* at 511, 678 S.E.2d at 17.

The Office of Judges concluded that the Mr. Smith's argument that the application of Rule 20 is inconsistent with statutory law is not in accordance with this Court's ruling in *Simpson*. The only independent medical evaluation, which was from Dr. Bachwitt, found that the petitioner only had an 8% whole-person impairment under Rule 20, Table 85-20-C. Based upon the evidence of record, the Office of Judges affirmed the claims administrator's decision to award Mr. Smith an 8% award for the lumbar spine injury, and a 0% award for the left hip. The Board of Review reached the same reasoned conclusion. We agree with the Board of Review.

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 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