

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**MICHAEL W. SPAULDING,
Claimant Below, Petitioner**

FILED
February 8, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**vs.) No. 11-0811 (BOR Appeal No. 2045218)
(Claim No. 2002010713)**

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

and

**RITCH CREEK SERVICES, LLC
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Michael W. Spaulding, by John Blair, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. The West Virginia Office of Insurance Commissioner, by Gary Mazezka, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 26, 2011, in which the Board affirmed an October 25, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's April 6, 2009, decision granting no additional permanent partial disability award for the right knee injury. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Spaulding was working as a heavy equipment operator for Ritch Creek Services when he injured his right knee. The claim was held compensable for a knee sprain and he was treated conservatively. Based on an evaluation by Dr. Scott, Mr. Spaulding was awarded a 2% permanent partial disability award on January 10, 2003. Dr. Poletajev evaluated Mr. Spaulding on December 14, 2007, and found that he suffered from 13% whole person impairment due to the compensable injury. On March 19, 2009, Dr. Scott evaluated the claimant a second time and confirmed his earlier 2% impairment finding. On April 6, 2009, the claims administrator granted no additional permanent partial disability award. Dr. Mukkamala found that Mr. Spaulding had normal range of motion and no atrophy on June 3, 2010.

The Office of Judges concluded that the preponderance of the evidence did not support an additional permanent partial disability award. On appeal, Mr. Spaulding argues that only Dr. Poletajev conducted a full evaluation of his current condition, and thus he is entitled to a 13% permanent partial disability award as found by that evaluation. The West Virginia Office of Insurance Commissioner maintains that Mr. Spaulding is not entitled to an additional permanent partial disability award.

In affirming the claims administrator's Order, the Office of Judges found that Mr. Spaulding had not shown that there had been a progression or aggravation of the compensable injury to justify an additional permanent partial disability award. The Office of Judges noted that Dr. Poletajev's measurements were distinctly different from the other physicians' findings. The Office of Judges held that the preponderance of the evidence did not support an additional permanent partial disability award. The Board of Review agreed in its Order of April 26, 2011. We agree with the reasoning and conclusions of 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: February 8, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II