

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

September 14, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

GILBERT D. HAGERMAN, Petitioner

vs.) **No. 11-0878** (BOR Appeal No. 2045288)
(Claim No. 2006062324)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
JENNIFER L. SMITH, Respondent**

MEMORANDUM DECISION

Petitioner Gilbert D. Hagerman, by Gregory Prudich, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order granting a 10% permanent partial disability award. Jennifer L. Smith, by H. Toney Stroud, her attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated May 5, 2011, in which the Board affirmed a November 16, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's July 20, 2009, decision granting Mr. Hagerman a 10% permanent partial disability award for his compensable injuries to his lumbar spine and left knee. 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.

Mr. Hagerman was working as a truck driver for Jennifer Smith when he was injured. The claim was held compensable for sprain/strain of the lumbar region, pain in the lower leg, and sprain/strain of the thoracic region. On July 20, 2009, the claims administrator granted Mr. Hagerman an 8% permanent partial disability award for his lumbar spine, and a 2% permanent

partial disability award for his left knee, for a total of a 10% award based on the report by Dr. Kropac.

The Office of Judges, in affirming the claims administrator, found that the preponderance of the evidence established that Mr. Hagerman suffered from no more than a 10% impairment due to the compensable injuries. On appeal, Mr. Hagerman disagrees and asserts that according to the report of Dr. Guberman, he is entitled to an additional 11% permanent partial disability award, for a total of 21%. Drs. Kropac, Guberman, and Mukkamala evaluated Mr. Hagerman to determine his permanent impairment resulting from the compensable injuries. Dr. Kropac found that Mr. Hagerman suffered from 10% whole person impairment, finding no impairment in the thoracic spine. Dr. Guberman found that Mr. Hagerman suffered from 21% whole person impairment, finding a 6% impairment for the thoracic spine due to loss of range of motion, and including herniated discs in his impairment rating. Dr. Mukkamala found that Mr. Hagerman suffered from a 9% impairment, agreeing with Dr. Kropac that there was no impairment in the thoracic spine.

In reaching the conclusion to affirm the 10% permanent partial disability award, the Office of Judges concluded that Dr. Kropac's evaluation is reliable. The Office of Judges noted that Dr. Kropac and Dr. Mukkamala had very similar findings in their evaluations, including no impairment in the thoracic spine. Additionally, the Office of Judges noted that Dr. Guberman not only found a 6% impairment for the thoracic spine, but also rated the herniated discs, which were found non-compensable in the claim, and radiculopathy that was most likely related to the herniated discs. The Office of Judges concluded that the evidence establishes that Mr. Hagerman is entitled to a 10% permanent partial disability award in relation to the compensable injuries. The Board of Review reached the same reasoned conclusion in its decision of May 5, 2011.

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 Board of Review Order is affirmed.

Affirmed.

ISSUED: September 14, 2012

CONCURRED IN BY:

Justice Robin J. Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTED IN BY:

Chief Justice Menis E. Ketchum