

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**STEVE FOWLER,
Claimant Below, Petitioner**

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

vs.) No. 11-1028 (BOR Appeal No. 2045430)
(Claim No. 2002048320)

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

and

**NEWTOWN ENERGY, INC.,
Employer Below, Respondent**

MEMORANDUM DECISION

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

This appeal arises from the Board of Review's Final Order dated June 13, 2011, in which the Board affirmed a December 13, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's December 22, 2009, decision which corrected an Order from February 23, 2009, and reduced the additional permanent partial disability award to an additional 1% for his thoracic spine 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. Fowler was working as a unihauler operator for Newtown Energy when he ran over a large rock and hit his head on the canopy of the machine. On February 23, 2009, the claims administrator granted Mr. Fowler an additional 3% permanent partial disability award for the thoracic spine. On December 29, 2009, the claims administrator corrected the decision from February 23, 2009, and reduced the additional permanent partial disability award to an additional 1% for the thoracic spine based on Dr. Bachwitt's report dated December 16, 2008.

The Office of Judges affirmed the claims administrator's decision to grant an additional partial permanent disability award of 1%. On appeal, Mr. Fowler disagrees and asserts that the Board of Review and the Office of Judges erred in finding Dr. Carlson's report unreliable. The West Virginia Office of Insurance Commissioner maintains that the Board of Review should be affirmed because Dr. Carlson's report failed to distinguish the amount of the thoracic injury that is attributable to degenerative disease. Dr. Carlson concluded that Mr. Fowler has 6% whole person impairment for the thoracic spine, and 7% for the left shoulder. Dr. Bachwitt performed an independent medical evaluation and concluded that Mr. Fowler has 8% whole man impairment for the cervical spine but found that half was due to preexisting changes, 5% whole man impairment for the thoracic spine, and a total 9% whole person impairment for this injury minus any prior awards.

The Office of Judges noted that while Dr. Bachwitt and Dr. Carlson determined that Mr. Fowler has degenerative disc disease, Dr. Bachwitt rated compensable conditions and properly assessed an apportionment of impairment to degenerative changes whereas Dr. Carlson rated the shoulder which is not a compensable injury and failed to apportion any of the impairment to degenerative changes even though he noted that degenerative changes exist. Thus, the Office of Judges affirmed the decision to grant an additional permanent partial disability award of 1%. The Board of Review reached the same reasoned conclusions in its decision of June 13, 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: May 8, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin

Justice Robin J. Davis

Justice Margaret L. Workman

Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum