

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

June 12, 2013

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

**CONSOLIDATION COAL COMPANY,  
Employer Below, Petitioner**

**vs.) No. 11-1295** (BOR Appeal No. 2045754)  
(Claim No. 2010138233)

**REX W. WHIPKEY,  
Claimant Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Consolidation Coal Company, by Edward M. George III, its attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Rex W. Whipkey, by Robert L. Stultz, his attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated August 25, 2011, in which the Board affirmed a March 24, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's June 30, 2010, decision that Mr. Whipkey's right wrist injury was not compensable. 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. Whipkey was employed by Consolidation Coal Company. On June 10, 2010, while laying down rail tracks for an underground mine, Mr. Whipkey injured his wrist when the sledge hammer he was using to drive spikes into the rails hit a clamp and twisted. His wrist immediately began to swell and he reported the injury to his supervisor. Mr. Whipkey was diagnosed with a sprained right wrist at Wheeling Hospital Emergency Room. On June 14, 2010, Mr. Whipkey was evaluated by Dr. Milton, who noted that the x-rays of Mr. Whipkey's wrist showed signs of an old fracture. Dr. Milton also noted degenerative changes in Mr. Whipkey's right wrist. Based on Dr. Milton's report, the claims administrator rejected Mr. Whipkey's claim on June 30, 2010,

stating that Mr. Whipkey had not incurred a compensable injury. But on March 24, 2011, the Office of Judges reversed the claims administrator's decision, holding the claim compensable for a right wrist sprain. The Board of Review affirmed the Office of Judges' Order on August 25, 2011, leading to this appeal by Consolidation Coal Company.

The Office of Judges found, based on the diagnostic reports from Wheeling Hospital and Mr. Whipkey's deposition, that a preponderance of the evidence weighed in favor of finding that Mr. Whipkey had received an injury during the course of his employment at Consolidation Coal Company. The Office of Judges recognized that Mr. Whipkey had an old fracture of his right wrist, which had healed, but found that this did not contradict Mr. Whipkey's demonstration that he had received a new injury. The Board of Review adopted the findings of the Office of Judges and affirmed its Order on August 25, 2011.

We agree with the conclusions of the Board of Review. Mr. Whipkey has presented sufficient evidence to show that he has a new compensable injury and Consolidation Coal Company has not presented any evidence that contradicts this demonstration. Although the report of Dr. Milton shows that Mr. Whipkey had an old injury in his right wrist, this fact does not preclude Mr. Whipkey from being compensated for a new injury that he received in the course of his employment.

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: June 12, 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