

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**CHARLES R. VARNEY II,
Claimant Below, Petitioner**

FILED
June 11, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 11-1483 (BOR Appeal No. 2045818)
(Claim No. 2009079470)

**BRODY MINING, LLC,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Charles R. Varney II, by Reginald D. Henry, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Brody Mining, LLC, by Matthew L. Williams, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated September 29, 2011, in which the Board reversed an April 7, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's October 13, 2009, decision granting Mr. Varney a 3% permanent partial disability award. 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. Varney worked as a shuttle car operator for Brody Mining, LLC. On January 5, 2009, he was injured when he was bounced while operating a shuttle car causing him to hit his head on the canopy of the machine. The claims administrator held the claim compensable for sprain/strain of the neck and contusion of multiple sites and granted Mr. Varney a 3% permanent partial disability award. On April 7, 2011, the Office of Judges reversed the claims administrator's decision and granted an 8% permanent partial disability award in addition to the previous 5% permanent partial disability award.

The Board of Review reversed the Office of Judges' Order and reinstated the claims administrator's decision that granted a 3% permanent partial disability award. On appeal, Mr. Varney disagrees and asserts that the Board of Review erred in determining that a deduction of prior permanent partial disability awards should be made after an evaluator has applied West Virginia Code of State Rules § 85-20 (2006) because otherwise his impairment would be underestimated. Brody Mining, LLC maintains that the Board of Review correctly applied West Virginia Code of State Rules § 85-20 because it is clearly established that prior permanent partial disability awards should be deducted after applying West Virginia Code of State Rules § 85-20.

The Board of Review concluded that the Office of Judges' erred in relying on the recommendation of Bruce A. Guberman, M.D., for an 8% permanent partial disability award. The Board of Review discredited Dr. Guberman's recommendation because he deducted Mr. Varney's prior permanent partial disability award from his range of motion impairment rating before utilizing West Virginia Code of State Rules § 85-20. William Hoh, M.D., found that Mr. Varney had an 8% impairment for the cervical spine under West Virginia Code of State Rules § 85-20. He did not make a deduction for Mr. Varney's prior permanent partial disability award. Randall L. Short, D.O., found that Dr. Hoh properly recommend an 8% whole person impairment under West Virginia Code of State Rules § 85-20 but did not deduct for Mr. Varney's prior award. Dr. Short concluded that the deduction of prior permanent partial disability awards should be made after an evaluator has applied West Virginia Code of State Rules § 85-20. Dr. Short deducted Mr. Varney's prior 5% permanent partial disability award from the 8% whole person impairment and recommended that Mr. Varney receive a 3% permanent partial disability award for this claim. The Board of Review concluded that the deduction of prior permanent partial disability awards should be performed after an evaluator applied West Virginia Code of State Rules § 85-20 and reinstated the claims administrator's decision granting Mr. Varney a 3% permanent partial disability award. 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: June 11, 2014

CONCURRED IN BY:

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