

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**LAWRENCE W. HORNER JR.,
Claimant Below, Petitioner**

FILED
November 1, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs.) No. 12-0094 (BOR Appeal No. 2046155)
(Claim No. 2009094197)

**NORTH AMERICAN INDUSTRIAL SERVICES, INC.,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Lawrence W. Horner Jr., by Jonathan Bowman, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. North American Industrial Services, Inc., by Lucinda Fluharty, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated December 21, 2011, in which the Board affirmed a June 29, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's May 10, 2010, decision granting Mr. Horner an 8% permanent partial disability award for his lower back 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. Horner sustained injuries to his right upper and lower extremities, and his lower back while working for North American Industrial Services, Inc. On October 28, 2009, Dr. Grady found that Mr. Horner had reached maximum medical improvement for the right upper and lower extremities, and that he suffered no whole person impairment from those injuries. Dr. Sethi evaluated Mr. Horner on January 18, 2010, and found that he had 10% whole person impairment in the lower back. Dr. Sethi amended his opinion on May 5, 2010, and recommended that Mr. Horner was actually in lumbar Category II under West Virginia Code of State Rules §

85-20 (2006), and had 8% whole person impairment attributable to the compensable lower back injury. The claims administrator granted Mr. Horner an 8% permanent partial disability award for his lower back on May 10, 2010. Dr. Dauphin evaluated Mr. Horner on October 15, 2010, and found that he had 10% whole person impairment, Dr. Dauphin placed him in lumbar Category III due to verifiable radiculopathy evidenced by numbness and atrophy in the right leg. Dr. Langa evaluated Mr. Horner on February 10, 2011, and found that he had 8% whole person impairment; she noted the absence of radiculopathy.

The Office of Judges affirmed the claims administrator's decision, and held that the preponderance of the evidence indicates that Mr. Horner is entitled to only an 8% permanent partial disability award for his lower back. On appeal, Mr. Horner argues that he is entitled to an additional 2% permanent partial disability award based on Dr. Dauphin's evaluation, and notes that Dr. Dauphin found radiculopathy. North American Industrial Services maintains that the preponderance of the evidence does not establish that Mr. Horner has significant radiculopathy, and thus the 8% permanent partial disability award is correct.

In affirming the claims administrator's decision, the Office of Judges found that Mr. Horner was properly placed into lumbar Category II under West Virginia Code of State Rules § 85-20. Lumbar Category III under West Virginia Code of State Rules § 85-20 requires significant signs of radiculopathy, and the Office of Judges noted that Dr. Dauphin's findings of radiculopathy were not corroborated by the other evidence of record. Thus, the Office of Judges concluded that Mr. Horner was not entitled to an additional permanent partial disability award. The Board of Review reached the same reasoned conclusions in its decision of December 21, 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: November 1, 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