

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**PERFORMANCE COAL COMPANY,
Employer Below, Petitioner**

vs.) No. 13-0369 (BOR Appeal No. 2047485)
(Claim No. 2000044324)

**RUSSELL E. HOGE JR.,
Claimant Below, Respondent**

FILED
June 27, 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Performance Coal Company, by Paul Pinson, its attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Russell E. Hoge Jr., by Reginald D. Henry, his attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 22, 2013, in which the Board affirmed a July 19, 2012, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's May 17, 2010, decision which granted Mr. Hoge a permanent total disability award with an onset date of September 11, 2009. 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. Hoge, a coal miner, was awarded a permanent total disability award by the claims administrator on May 17, 2010. Performance Coal Company appealed and the Office of Judges affirmed the claims administrator's decision in its July 19, 2012, Order. It found that it was prohibited from considering Performance Coal Company's protest by the provisions of West Virginia Code § 23-5-1(b) (2009) which provides three situations in which an employer may protest a decision of the claims administrator. Decisions that may be protested by the employer are those incorporating findings of the Occupational Pneumoconiosis Board, decisions made by

the Insurance Commissioner acting as administrator of claims involving funds created in West Virginia Code § 23-5-2 (2005), or decisions made pursuant to West Virginia Code § 23-4-7a (c)(1) (2005). The Office of Judges found that the claims administrator's decision does not provide any of the aforementioned scenarios which afford Performance Coal Company standing to protest. Performance Coal Company empanelled its own Permanent Total Disability Review Board and the claims administrator's decision was based upon that Board's final recommendations. Therefore, the Office of Judges held that Performance Coal Company had no standing to protest the claims administrator's decision and that the decision must therefore be affirmed. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order in its March 22, 2013, decision. This Court agrees with the reasoning and conclusions of the Board of Review. Performance Coal Company has no standing to protest the claims administrator's decision.

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 27, 2014

CONCURRED IN BY:

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

Justice Brent D. Benjamin, disqualified