

**STATE OF WEST VIRGINIA  
SUPREME COURT OF APPEALS**

**FILED**

July 12, 2011

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

**Alice G. Conner,  
Claimant Below, Petitioner**

**vs.) No. 35427 (BOR Appeal No. 2041726)  
(Claim No. 2003056700)**

**West Virginia Office of Insurance Commissioner  
and the Boone County Commission,  
Respondents**

**MEMORANDUM DECISION**

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated April 8, 2009, in which the Board reversed an August 21, 2008, Order of the Workers' Compensation Office of Judges and reinstated the Claim's Administrator's initial award of 4% PPD. In its Order, the Office of Judges reversed the claims administrator's award of 4% PPD and granted the claimant an additional 8% PPD award. The appeal was timely filed by the petitioner and a response was filed by the Employer. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this matter is appropriate for consideration under the Revised Rules. Having considered the petition and the relevant decision of the lower tribunal, the Court is of the opinion that the decisional process would not be significantly added by oral argument. Upon consideration of the standard of review, the Court determines that there is no prejudicial error. This case does not present a new or significant question of law. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In this case, the claimant was diagnosed with bilateral carpal tunnel syndrome. Dr. Paul Bachwitt evaluated the claimant under Table 16 of the AMA Guides (4<sup>th</sup> Ed.) Dr. Bachwitt found that the claimant suffered mild impairment and believed that the claimant's award should be prorated to 2% impairment, in accordance with W.Va C.S.R. 85-20- §64.5 (2004). The Claim's Administrator granted the claimant a 4% PPD award on September 19, 2007, based upon the recommendation of Dr. Bachwitt.

The OOJ reversed the CA, concluding that the claimant had demonstrated that the medical evidence was sufficient in order to grant 12% PPD. The OOJ interpreted 85 CSR 20 §§64.1 and

64.5 to mean that impairments for on affected upper extremity in excess of 6% will have the awards reduced to 6%. Under the OOI's interpretation of this regulation, a 6% impairment rating is effectively established as a minimum and a maximum if any impairment is present.

The BOR reversed the OOI, and reinstated the CA's 4% PPD award. The BOR reasoned that Dr. Bachwitt's report was relevant, credible, material and reliable, and that the ALJ had substituted its own opinion for that of a medical expert.

In *Timothy E. Davies v. WVOIC and Alcan Rolled Products, LLC*, No. 35550, a decision issued on April 1, 2011, the West Virginia Supreme Court of Appeals held that W. Va C.S.R. §85-20-64.5 (2004) was invalidated and cannot be applied to carpal tunnel syndrome impairment ratings under Table 16 of the AMA Guides (4<sup>th</sup> Ed.). The Court reasoned that Mr. Davies was entitled to a 6% award because W. Va. C.S.R. §85-20-64.5 cannot be applied to his PPD claim insofar as his impairment evaluation was conducted using Table 16, and because the only evidence of his level of impairment is the 6% whole-person impairment found by the medical expert prior to the doctor's attempt to apply §85-20-64.5.

We find the decision of the Board of Review to be in clear violation of statutory provision. Therefore, in light of this Court's holding in *Davies*, this appeal is remanded to the BOR with directions to reinstate the August 21, 2008, Order of the OOI. Having been properly evaluated under Table 16 of the AMA Guides (4<sup>th</sup> Ed.), the claimant is entitled to the maximum amount allowed pursuant to Rule 20 for each wrist, which is 6% PPD. The claimant should be granted an additional 8% PPD award, for a total of 12%.

Reverse and Remand

**ISSUED:** July 12, 2011

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman  
Justice Robin Jean Davis  
Justice Brent D. Benjamin  
Justice Menis E. Ketchum  
Justice Thomas E. McHugh