

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

**KERRY N. GIVEN, Petitioner**

**July 20, 2012**  
**RORY L. PERRY II, CLERK**  
**SUPREME COURT OF APPEALS**  
**OF WEST VIRGINIA**

**vs.) No. 100652 (BOR Appeal No. 2043879)**  
**(Claim No. 2003001421)**

**WEST VIRGINIA OFFICE OF**  
**INSURANCE COMMISSIONER, WHITE BUCK**  
**COAL COMPANY, ALEX ENERGY, INC., Respondent**

**MEMORANDUM DECISION**

Petitioner Kerry N. Given, by Robert Stultz, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order denying an additional permanent partial disability award. The West Virginia Office of Insurance Commissioner, by Mary Rich Maloy, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated April 19, 2010, in which the Board reversed a November 24, 2009, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's May 29, 2008, Order and granted the petitioner an additional 5% permanent partial disability award. 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 aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

Mr. Given has evidence of occupational pneumoconiosis, and based on his exposure and impairment he was previously granted a 5% permanent partial disability award. The claims administrator on May 29, 2008, granted no additional permanent partial disability award.

In reversing the claims administrator, the Office of Judges concluded that the evidence established that Mr. Given suffered from a 10% permanent partial disability due to occupational pneumoconiosis. Under West Virginia Code § 23-4-6a (2005), “the Office of Judges shall affirm the decision of the Occupational Pneumoconiosis Board following a hearing unless the decision is clearly wrong in view of the reliable, probative, and substantial evidence on the whole record.” The Office of Judges concluded that while the Occupational Pneumoconiosis Board’s medical findings were not clearly wrong, West Virginia Code of State Rules § 85-20-Table A (2006), was not properly applied. Thus, the evidence supports a finding that Mr. Given is entitled to an additional 5% permanent partial disability award.

In reversing the Office of Judges, the Board of Review found that the Occupational Pneumoconiosis Board’s decision was supported by West Virginia Code of State Rules § 85-20-Table A (2006). This Court disagrees and finds the evidence supports a finding that Mr. Given is entitled to an additional 5% permanent partial disability award, for a total of a 10% permanent partial disability award for occupational pneumoconiosis.

For the foregoing reasons, we find that the decision of the Board of Review is based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the Board of Review Order is reversed and remanded with instructions to enter an Order granting Mr. Given an additional 5% permanent partial disability award.

Reversed and Remanded.

**ISSUED: July 20, 2012**

**CONCURRED IN BY:**

Chief Justice Menis E. Ketchum

Justice Margaret L. Workman

Justice Thomas E. McHugh

**DISSENTING:**

Justice Robin J. Davis

Justice Brent D. Benjamin disqualified