

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

PHILEMON H. DILLARD, Petitioner

vs.) No. 101134 (BOR Appeal No. 2044077)
(Claim No. 890002217)

FILED

October 26, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
AMERICAN FREIGHT SYSTEMS, INC.,
Respondent**

MEMORANDUM DECISION

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated August 10, 2010, in which the Board affirmed a January 7, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's June 16, 2006, Order, which granted Mr. Dillard a 14% permanent partial disability award. The appeal was timely filed by the petitioner, and the West Virginia Office of Insurance Commissioner filed a response. 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 parties' submissions 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 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.

The Board of Review affirmed the Office of Judge's Order, which granted Mr. Dillard a 14% permanent partial disability award. Mr. Dillard argues that he is entitled to a greater award based upon the findings of Dr. Clifford Carlson. Mr. Dillard submits that Dr. Carlson's report is more reliable and credible than the reports of Dr. Paul Bachwitt and Dr. Michael DeWitt. Specifically, Claimant states that Dr. Bachwitt's report is flawed because he was unable to find the degree of pain that Mr. Dillard associated with his right knee. Drs.

DeWitt and Carlson did, however. But, Dr. DeWitt's report is flawed because his examination was conducted prior to a patella fracture. Dr. Carlson examined Mr. Dillard after this fracture, which accounts for Dr. Carlson's higher impairment ratings.

The Office of Judges noted first that Dr. Carlson's report is deemed to be less reliable than the others. (Jan. 7, 2010, Office of Judges Order, p. 6.) First, Dr. Carlson's report found much greater impairment than the evaluators who examined Mr. Dillard both prior to and after Dr. Carlson. *Id.* Additionally, Dr. Carlson purportedly found right knee spasm, but the other evaluators did not. *Id.* Dr. DeWitt's examination was found to be the most reliable, and Dr. DeWitt's conclusions are buttressed by Dr. Bachwitt's conclusions, which were formulated after Mr. Dillard's patella fracture. *Id.* at p. 7. Thus, the Office of Judges affirmed the grant of a 14% permanent partial disability award. The Board of Review reached the same reasoned conclusion in affirming the Office of Judges in its August 10, 2010, decision.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, clearly the result of erroneous conclusions of law, or based upon the Board's material misstatement or mischaracterization of particular components of the evidentiary record. Therefore, the grant of a 14% permanent partial disability award is affirmed.

Affirmed.

ISSUED: October 26, 2011

CONCURRED IN BY:

Chief Justice Margaret Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh