

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

JERRY W. ROSE, Petitioner

vs.) **No. 101552 (BOR Appeal No. 2044567)**
(Claim No. 2008028923)

FILED

June 18, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
WAYNE COUNTY BOARD OF EDUCATION,
Respondent**

MEMORANDUM DECISION

Petitioner, Jerry W. Rose, by John C. Blair, appeals the Board of Review Order affirming the grant of a 5% permanent partial disability following his lumbar spine injury. The Wayne County Board of Education, by Nathaniel A. Kuratomi, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review Final Order dated November 8, 2010, in which the Board affirmed a May 17, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's November 17, 2008, Order, which granted a 4% permanent partial disability award for Mr. Rose's lumbar spine. The Office of Judges granted Mr. Rose a 5% permanent partial disability award for his lumbar spine. The Court has carefully reviewed the records, written arguments, and appendices contained in the petition, and the case is mature for consideration.

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 Judges' Order, which granted Mr. Rose a 5% permanent partial disability award for his lumbar spine. Mr. Rose argues that he is entitled to an 8% permanent partial disability award per the report of Dr. Bruce A. Guberman. Dr. Paul Bachwitt, who evaluated Mr. Rose and whose report forms the basis of his 5% award, apportioned half of Mr. Rose's impairment to preexisting degenerative changes. Mr. Rose argues that Dr. Bachwitt's apportionment was in error, and Dr. Bachwitt failed to provide a basis for apportioning 50% of Mr. Rose's impairment. Finally, Mr. Rose notes that Dr. Bachwitt made his apportionment at the incorrect time. Mr. Rose contends that Dr. Bachwitt should have apportioned any impairment prior to applying Rule 20; however, Dr. Bachwitt apportioned following application of Rule 20. For these

reasons, Mr. Rose submits that Dr. Bachwitt's report is unreliable and that he is entitled to an 8% permanent partial disability award per the report of Dr. Guberman.

The Office of Judges first detailed Mr. Rose's pre-compensable injury back pain, of which Dr. Guberman was unaware. Mr. Rose's medical records reveal complaints of low back pain on January 27, 2007 - a year before his subject compensable injury. Mr. Rose continued to complain of back pain through January 10, 2008 - merely one week prior to the subject compensable injury. Thus, Dr. Guberman's notation that Mr. Rose had no history of low back pain prior to the compensable injury, and his subsequent finding that any apportionment of preexisting impairment is improper, are contrary to the evidence.

Rather, W. Va. Code § 23-4-9b directs that any preexisting impairment be deducted from any impairment resulting from an occupational injury. Because Mr. Rose's medical records document preexisting back pain beginning at least one year prior to the subject compensable injury, apportioning preexisting impairment was wholly proper. Dr. Guberman's failure to make such an apportionment renders his report unreliable.

Dr. Bachwitt, however, did deduct the preexisting impairment, but he made the deduction at an improper time. The *AMA Guides to the Evaluation of Permanent Impairment*, Fourth Edition, requires preexisting impairment to be deducted following an impairment calculation using the Range of Motion Model. Dr. Bachwitt initially found 10% whole person impairment. Dr. Bachwitt felt that one half of this impairment was attributable to Mr. Rose's preexisting degenerative changes, which the Office of Judges found proper in light of Mr. Rose's continued complaints beginning at least one year prior to the subject injury. However, this deduction should have been made after Dr. Bachwitt's Range of Motion Model calculation, leaving 5% whole person impairment. This figure is then compared with the allowable ranges set forth in W. Va. Code R. § 85-20-C. As 5% impairment is within the ranges set forth in Table C, no adjustment was necessary, and the Office of Judges concluded that Mr. Rose is entitled to a 5% permanent partial disability award. The Board of Review reached the same reasoned conclusion in its November 8, 2010, Order.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it so clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the Board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. Therefore, the grant of a 5% permanent partial disability award for Mr. Rose's lumbar spine is affirmed.

Affirmed.

ISSUED: June 18, 2012

CONCURRED IN BY:

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

DISSENTING:

Chief Justice Menis E. Ketchum