

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 5, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

THOMAS L. COOPER, Petitioner

vs.) **No. 11-0615** (BOR Appeal No. 2045074)
(Claim No. 2008049105)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
APPALACHIAN POWER COMPANY, Respondent**

MEMORANDUM DECISION

Petitioner Thomas L. Cooper, by Patrick Maroney, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Appalachian Power Company, by James Heslep, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated March 8, 2011, in which the Board reversed an August 25, 2010, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's March 18, 2009, decision and granted Mr. Cooper a 43% permanent partial disability award for his right hand injury. 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 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. 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.

Mr. Cooper injured his right hand, including the amputation of fingers, while working for Appalachian Power Company. He also suffered from a noncompensable injury to his right wrist in 1972 which required surgery. On March 18, 2009, the claims administrator granted Mr. Cooper a 37% permanent partial disability award for the compensable injury based on Dr. Mukkamala's recommendation.

The Office of Judges reversed the claims administrator's Order, and granted Mr. Cooper a 43% permanent partial disability award based on Dr. Guberman's findings. The Board of

Review reversed the Office of Judges and based on Dr. Bachwitt's report granted Mr. Cooper a 38% permanent partial disability award. On appeal, Mr. Cooper argues that Dr. Guberman's report is the most credible and reliable evidence on the issue of apportioning for a prior wrist injury and therefore he is entitled to a 43% permanent partial disability award. Appalachian Power Company maintains that the Board of Review was correct in finding the loss of motion impairment in the wrist should be apportioned due to the prior injury.

Dr. Mukkamala found that Mr. Cooper suffered from 37% whole person impairment for the compensable injury. This recommendation included a finding that the loss of motion in the wrist should be apportioned by 50% to the prior wrist injury. Dr. Guberman found that Mr. Cooper suffered from 43% whole person impairment for the compensable injury. Dr. Guberman did not apportion loss of motion to the prior injury because he found that an evaluation by Dr. Beard in August of 2000 noted no loss of motion in the right wrist. Finally, Dr. Bachwitt found Mr. Cooper suffered from a 38% whole person impairment, also apportioning 50% of his loss of motion in the wrist to the prior injury.

Dr. Mukkamala and Dr. Bachwitt both apportioned 50% of the loss of motion to the prior wrist injury. However, Dr. Mukkamala was the only physician who noted that Mr. Cooper reported loss of motion, and Dr. Bachwitt stated he didn't know if there was motion restriction resulting from the prior injury. The Office of Judges found Dr. Guberman's impairment rating to be the most credible, noting his decision not to apportion was based on an evaluation in August of 2000 finding no loss of motion in the right wrist. We agree with the Office of Judges' conclusion that Mr. Cooper is entitled to a 43% permanent partial disability award for the compensable injury.

For the foregoing reasons, we find that the decision of the Board of Review is clearly based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is reversed and remanded with instruction to reinstate the Office of Judges August 25, 2010, Order.

Reversed and Remanded.

ISSUED: December 5, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin J. Davis
Justice Margaret L. Workman
Justice Thomas E. McHugh

DISSENTING:

Justice Brent D. Benjamin