

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 19, 2013

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

**ADAM SMITH,
Claimant Below, Petitioner**

vs.) **No. 12-0532** (BOR Appeal No. 2046431)
(Claim No. 2009071899)

**TRI-STAR TELECOM SERVICES, LLC,
Employer Below, Respondent**

MEMORANDUM DECISION

Petitioner Adam Smith, by Cathy Greiner, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Tri-Star Telecom Services, LLC, by Matthew Williams, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated April 25, 2012, in which the Board affirmed a May 31, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges affirmed the claims administrator's August 18, 2009, decision granting Mr. Smith a 13% permanent partial disability award. The Court has carefully reviewed the records, written arguments, and appendices contained in the briefs, and the case is mature for consideration.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and 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 no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Smith was injured on December 11, 2008, when he fell backwards into a concrete piling while cutting a telephone pole. The claim was held compensable for contusion of the back, fracture of lumbar vertebra, and fracture of dorsal vertebra. Mr. Smith has undergone three independent medical evaluations to determine the amount of permanent impairment resulting from these injuries. Dr. Loimil and Dr. Ranavaya both utilized the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) and West Virginia Code of State Rules § 85-20 (2006), and both recommended a 13% permanent partial

disability award. Dr. Guberman recommended a 15% permanent partial disability award utilizing the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed.) and West Virginia Code of State Rules § 85-20. However, he stated that in his opinion, West Virginia Code of State Rules § 85-20 does not provide an accurate method of obtaining an impairment rating given Mr. Smith's particular injuries. He then recommended a 28% permanent partial disability award utilizing the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (5th ed. 2000). On August 18, 2009, the claims administrator granted Mr. Smith a 13% permanent partial disability award.

In its Order affirming the August 18, 2009, claims administrator's decision, the Office of Judges held that Mr. Smith has a total of 13% whole person impairment for his compensable injuries. Mr. Smith disputes this finding and asserts, per the opinion of Dr. Guberman, that he is entitled to at least a 15% permanent partial disability award.

As was noted by the Office of Judges, Dr. Guberman is not permitted to bypass West Virginia Code of State Rules § 85-20 and therefore his recommendation of a 28% permanent partial disability award is erroneous. After reviewing the evidence of record, the Office of Judges found the opinions of Dr. Loimil and Dr. Ranavaya, who both recommended a 13% permanent partial disability award, to be persuasive. The Board of Review affirmed the reasoning and conclusions of the Office of Judges in its decision of April 25, 2012. We agree with the conclusions of the Board of Review.

For the foregoing reasons, we find that the decision of the Board of Review is not in clear violation of any constitutional or statutory provision, nor is it clearly the result of erroneous conclusions of law, nor is it based upon a material misstatement or mischaracterization of the evidentiary record. Therefore, the decision of the Board of Review is affirmed.

Affirmed.

ISSUED: December 19, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II