

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**FILED**

October 7, 2015

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

**RANDY N. KENNEDY,**  
**Claimant Below, Petitioner**

vs.) **No. 14-0292** (BOR Appeal No. 2048695)  
(Claim No. 2011039944)

**KINGSTON MINING, INC,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Randy N. Kennedy, by Reginald D. Henry, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Kingston Mining, Inc., by Marion E. Ray, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated February 26, 2014, in which the Board affirmed an August 20, 2013, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's December 2, 2011, decision to grant a 0% permanent partial disability award. The Office of Judges determined that Mr. Kennedy was entitled to 5% permanent partial disability for the cervical spine, 2% permanent partial disability for the left shoulder, and 0% permanent partial disability for the thoracic spine for a total of 7% permanent partial disability. 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.

Randy Kennedy, an underground maintenance supervisor for Kingston Mining, Inc., was working in an underground mine on May 23, 2011, when a telephone cable got caught around the miner's safety box attached to his hip. The telephone wire pulled him off balance, and his

head struck a seam of coal. Mr. Kennedy filed for workers' compensation benefits, and his claim was held compensable on June 13, 2011, for a sprain of the cervical spine, neuralgia, neuritis and radiculopathy of an unspecified site, sprain of the shoulder, sprain of the upper arm, and sprain of the thoracic spine. Mr. Kennedy's medical history included a compensable lower back injury in 1999 for which he received a 22% permanent partial disability award.

On November 21, 2011, Marsha Bailey, M.D., performed an independent medical evaluation of Mr. Kennedy. Dr. Bailey opined that he had reached his maximum degree of medical improvement. Dr. Bailey found 4% whole person impairment of the cervical spine when she placed Mr. Kennedy in Cervical Category II-B of Table 75 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993). Dr. Bailey also found 2% whole person impairment when she placed Mr. Kennedy in Thoracic Category II-B of Table 75 of the American Medical Association's *Guides*. Dr. Bailey then apportioned all of the impairment to preexisting degenerative conditions and arthropathy. She did not find any ratable impairment in the lumbar spine.

On May 17, 2012, a nerve conduction study was performed by Barry Vaught, M.D. The study was noted to be abnormal; however, according to Dr. Vaught, there was evidence of C8-T1 radiculopathy on the left side.

On August 30, 2012, Mr. Kennedy had an independent medical evaluation by Bruce Guberman, M.D. Dr. Guberman found 4% whole person impairment when he placed Mr. Kennedy into Cervical Category II-B of Table 75 of the American Medical Association's *Guides*. Dr. Guberman then found 6% whole person impairment based upon range of motion defects of the cervical spine. However, when consulting West Virginia Code of State Rules § 85-20-E (2006), Dr. Guberman noted that Mr. Kennedy should be in Category III. As a result, Dr. Guberman adjusted his recommendation from 10% whole person impairment to 15% whole person impairment for the cervical spine. For the left shoulder, Dr. Guberman found 8% whole person impairment based upon range of motion defects. However, because the uninjured right shoulder showed 2% whole person impairment, Dr. Guberman adjusted the 8% whole person impairment down to 6% whole person impairment. For the thoracic spine, Dr. Guberman found 2% whole person impairment by placing Mr. Kennedy in Thoracic Category II-B of Table 75 of the American Medical Association's *Guides*. He also found 3% whole person impairment based upon range of motion defects. Because it fit within West Virginia Code of State Rules § 85-20-D (2006), Dr. Guberman assigned 5% whole person impairment for the thoracic spine. Dr. Guberman then used the combined values chart to reach a recommendation of 24% whole person impairment. Dr. Guberman also criticized Dr. Bailey's apportionment decision. He did not find any ratable impairment in the lumbar spine.

On October 19, 2012, Mr. Kennedy was seen by Prasadarao Mukkamala, M.D., for an independent medical evaluation. Dr. Mukkamala opined that Mr. Kennedy was at his maximum degree of medical improvement. Dr. Mukkamala placed Mr. Kennedy in Cervical Category II-B of Table 75 of the American Medical Association's *Guides*, which resulted in 4% whole person impairment. He also found 1% whole person impairment for the cervical spine range of motion defects. He then noted that the 5% whole person impairment rating fit into West Virginia Code

of State Rules § 85-20-E. Dr. Mukkamala then found 2% upper extremity impairment of the right shoulder and 6% upper extremity impairment for the left shoulder. He then attributed 4% of the upper extremity impairment of the left shoulder to the compensable injury, which resulted in a recommendation of 2% whole person impairment. He found no ratable thoracic spine impairment. Dr. Mukkamala then combined the 2% whole person impairment for the shoulder with the 5% whole person impairment from the cervical spine to reach a recommendation of 7% whole person impairment. He did not find any ratable impairment in the lumbar spine.

On October 23, 2012, Mr. Kennedy was seen by Robert Walker, M.D., for an independent medical evaluation. Dr. Walker opined that Mr. Kennedy was at his maximum degree of medical improvement. He then found 5% whole person impairment for range of motion defects in the cervical spine. He also found 6% whole person impairment when placing Mr. Kennedy in Cervical Category III-A of Table 75 of the American Medical Association's *Guides*. He also found 5% impairment of the cervical spine based upon sensory and motor defects. He utilized Table 12 and Table 13 of the American Medical Association's *Guides* to assign 48% upper extremity impairment multiplied by a .25 multiplier based upon Grade 2 sensory deficit, which resulted in 12% whole person impairment. Dr. Walker attributed 5% whole person impairment to degenerative changes and 11% whole person impairment to the compensable injury. Dr. Walker then applied West Virginia Code of State Rules § 85-20-E and placed Mr. Kennedy in Category III. This increased his 11% whole person impairment recommendation to 15% whole person impairment. Dr. Walker found 1% whole person impairment of the thoracic spine based upon range of motion testing. He felt that Table 75 of the American Medical Association's *Guides* could not be used to rate the thoracic spine. After applying West Virginia Code of State Rules § 85-20-D, he increased his recommendation of 1% whole person impairment to 5% whole person impairment to fit within the Category II. Dr. Walker recommended 5% whole person impairment for the lumbar spine after applying West Virginia Code of State Rules § 85-20-C. He was the only physician to note any impairment in the lumbar spine. This resulted in a finding of 24% whole person impairment related to the spine. He also found 7% whole person impairment based on the shoulder. This resulted in a final recommendation of 29% whole person impairment.

On December 17, 2012, Mr. Kennedy reported to A. E. Landis, M.D., for an independent medical examination. Dr. Landis noted that Dr. Vaught's nerve conduction study was interpreted as abnormal. Also, Dr. Landis was skeptical of a diagnosis of radiculopathy at C8-T1. Dr. Landis explained that there are only seven cervical discs in the human spine. Dr. Landis opined that Mr. Kennedy was at his maximum degree of medical improvement. He then found 5% whole person impairment when he placed Mr. Kennedy in Cervical Category II-B of Table 75 of the American Medical Association's *Guides*. He also found 5% whole person impairment for the range of motion deficit in the cervical spine. However, his ultimate recommendation was 5% whole person impairment for the cervical spine because he apportioned out half the impairment to degenerative changes. He found no impairment in the thoracic spine. He found 2% whole person impairment in the left shoulder. This added up to 7% whole person impairment for the injury. He did not find any ratable impairment in the lumbar spine. He was critical of Dr. Guberman, Dr. Walker, and Dr. Bailey. He felt that Dr. Bailey understated the impairment while Drs. Guberman

and Walker overstated the impairment. Dr. Landis felt that Dr. Guberman and Dr. Walker should have apportioned their rating because there were clearly degenerative changes in the spine.

The Office of Judges determined that Mr. Kennedy suffered from 7% permanent partial disability related to his May 23, 2011, compensable injury. The Office of Judges dismissed Dr. Bailey's findings because it found her apportionment decision to be arbitrary and without any physiological basis. The Office of Judges then dismissed the reports of Dr. Guberman and Dr. Walker. The Office of Judges did not agree with them placing Mr. Kennedy in West Virginia Code of State Rules § 85-20-E, Category III, because of the herniated disc. The Office of Judges noted that there was no evidence of a herniated disc and Mr. Kennedy should have been placed in Category II, even with a herniated disc. The Office of Judges then discredited Dr. Walker's report because he attributed whole person impairment to the lumbar spine. The Office of Judges noted that no lumbar spine injury has been added as a compensable condition of the claim. Furthermore, the Office of Judges noted that the prior 22% permanent partial disability award for the lumbar spine was not properly taken into account by Dr. Walker's report. The only two remaining reports were from Dr. Mukkamala and Dr. Landis. They both opined that Mr. Kennedy had 5% whole person impairment for the cervical spine and 2% whole person impairment for the left shoulder. Because their opinions were consistent and well-reasoned, the Office of Judges adopted their reports. The Board of Review adopted the findings of the Office of Judges and affirmed its Order.

We agree with the findings of the Office of Judges and conclusions of the Board of Review. The Office of Judges was within its discretion to discredit the report of Dr. Bailey. The evidence showed that she apportioned all Mr. Kennedy's impairment to degenerative changes while no other physician took such an aggressive stance on the apportionment issue. The evidence shows that while Mr. Kennedy did have degenerative changes he also suffered an injury, which caused permanent partial disability. Dr. Walker and Dr. Guberman placed Mr. Kennedy in West Virginia Code of State Rules § 85-20-E, Category III, because he had a herniated disc with radiculopathy. However, the nerve conduction study that Dr. Guberman and Dr. Walker relied on was interpreted by the examiner to be an abnormal study. However, even assuming that Mr. Kennedy did have a herniated disc, he would still fit into Category II of West Virginia Code of State Rules § 85-20-E. Dr. Walker also found impairment in the lumbar spine. No lumbar spine injury has been held compensable in this claim. In addition, even if it were held compensable, Mr. Kennedy has already received a 22% permanent partial disability award related to the lumbar spine, which Dr. Walker failed to take into consideration in his report. Because the consistent reports of Dr. Mukkamala and Dr. Landis indicate it was more probable than not that Mr. Kennedy only suffered from a total of 7% permanent partial disability, the Office of Judges and Board of Review were not in error for adopting their conclusion.

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: October 7, 2015**

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Allen H. Loughry II