

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

December 5, 2012

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

JOHNNIE A. DINGESS, Petitioner

vs.) **No. 35662** (BOR Appeal No. 2043410)
(Claim No. 2005001260)

**WEST VIRGINIA OFFICE OF
INSURANCE COMMISSIONER and
A&G TRUCKING, INC., Respondent**

MEMORANDUM DECISION

Petitioner, Johnnie A. Dingess, by John C. Blair, his attorney, appeals the West Virginia Workers' Compensation Board of Review's Order. The West Virginia Office of Insurance Commissioner, by David Stuart, its attorney, filed a timely response.

This appeal arises from the West Virginia Workers' Compensation Board of Review's Final Order dated February 2, 2010, in which the Board reversed a July 31, 2009, Order of the Office of Judges which granted the petitioner a 12% permanent partial disability award. In its Order, the Office of Judges reversed the claims administrator's decision to grant the petitioner no award for permanent partial disability. 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 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.

Petitioner Dingess was employed as a mechanic for A&G Trucking, Inc., when he filed a claim for carpal tunnel syndrome. Mr. Dingess reported numbness and tingling in both hands that he attributed to the continued use of his hands and wrists at work. On July 15, 2007, Dr. Paul Bachwitt evaluated the claimant and did not find any evidence of carpal tunnel syndrome on either side. Dr. Bachwitt was of the opinion that the claimant's symptoms were unlikely to be related to carpal tunnel syndrome. In reliance upon Dr. Bachwitt's report, the claims

administrator issued an order on October 6, 2007, indicating that no permanent partial disability had resulted from the compensable injury. The claimant protested the claims administrator's decision.

Dr. Victor Poletajev, in his evaluation of March 18, 2008, utilized Tables 11 and 15 of the Fourth Edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, to document 10% whole person impairment for each wrist. Dr. Poletajev correctly applied West Virginia Code of State Rules § 85-20-64.5¹, to reduce the rating to a cumulative 12% impairment for bilateral carpal tunnel syndrome.

Dr. P. B. Mukkamala submitted a January 29, 2009, report which strongly disagreed with the 12% rating of Dr. Poletajev. Instead, Dr. Mukkamala opined 2% whole person impairment for each wrist by utilizing Tables 11 and 15 of the *Guides*. In his final recommendation, Dr. Mukkamala offset 1% whole person impairment for each wrist due to the claimant's obesity. Thus, Dr. Mukkamala found that Mr. Dingess had only 1% whole person impairment for each wrist.

In its February 2, 2010, Order, the Office of Judges found that Dr. Poletajev's was the most reliable report for determining the claimant's impairment. Dr. Mukkamala's impairment rating was rejected due to an incorrect interpretation of Rule 20. Thus, the Office of Judges reversed the claims administrator's decision and granted the claimant a 12% permanent partial disability award for bilateral carpal tunnel syndrome.

The Board of Review reversed the decision of the Office of Judges based upon the report of Dr. Mukkamala. The Board deemed Dr. Mukkamala's finding of borderline/mild bilateral carpal tunnel syndrome with a 4% rating to be the only relevant, credible, material and reliable evidence of record. The Board awarded the claimant a 4% permanent partial disability award. We disagree with the Board's decision. The Office of Judges correctly concluded that Dr. Mukkamala's assessment was based upon an incorrect interpretation of West Virginia Code of State Rules § 85-20-64.5. The most reliable evidence in the record is the report of Dr. Victor Poletajev.

For the foregoing reasons, we find that the decision of the Board of Review is clearly the result of an erroneous conclusion of law. The Board of Review Order is reversed and the July 31, 2009, Order of the Office of Judges is reinstated.

Reversed.

¹ In *Davies v. West Virginia Office of Ins. Com'r*, 708 S.E.2d 524, 227 W.Va. 330 (W. Va. 2011), this Court held that West Virginia Code of State Rules § 85-20-64.5 (2004) was invalid as it applied to Table 16 of the American Medical Association's, *Guides to the Evaluation of Permanent Impairment*, at 57 (4th ed. 1993). However, both Drs. Mukkamala and Poletajev utilized Tables 11 and 15 in evaluating the claimant's carpal tunnel syndrome impairment. The Office of Judges correctly interpreted § 85-20-64.5 to establish the range of awards for impairment due to carpal tunnel syndrome as 0% - 6% for each affected hand. Any impairment ratings in excess of 6% will have their awards reduced to 6% under § 85-20-64.5.

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