

35550

STATE OF WEST VIRGINIA
WORKERS' COMPENSATION BOARD OF REVIEW

ALCAN ROLLED PRODUCTS - RAVENSWOOD, LLC,
Appellant

v.

TIMOTHY E. DAVIS,
Appellee

Docket No. 78

Appeal No. 2042608
Claim No. 2007227492
DOI 05/18/2007

MWWP PLLC
SEP 03 2009
RECEIVED

ORDER

This case came on for hearing on Thursday, July 23, 2009, before the Workers' Compensation Board of Review in Charleston, West Virginia.

Present: The Honorable James D. Gray, Chairperson, Rita F. Hedrick-Helmick and W. Jack Stevens, Members.

The following case is an appeal by the employer from a final order of the Workers' Compensation Office of Judges dated January 29, 2009, which reversed the claims administrator's order dated January 21, 2008, granting a 2% permanent partial disability award, and the Administrative Law Judge granted a 6% permanent partial disability award. The employer asserts that the claims administrator's order of January 21, 2008, should be reinstated.

The Workers' Compensation Board of Review has completed a thorough review of the record, briefs, and arguments. As required, the Workers' Compensation Board of Review has evaluated the decision of the Office of Judges in light of the standard of review contained in West Virginia Code § 23-5-12, as well as the applicable

statutory language as interpreted by the West Virginia Supreme Court of Appeals. Upon our review of this case, we have determined to reverse the decision of the Office of Judges, as the substantial rights of the employer have been prejudiced.

FINDINGS OF FACT:

The Board adopts the final order's findings of fact.

DISCUSSION:

The Board finds the final order's analysis and conclusions were clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The issue presented is the amount of permanent impairment the claimant has suffered as a result of right carpal tunnel syndrome. On January 7, 2008, Dr. Paul Bachwitt reported that he examined the claimant and noted that the claimant had a good result from right carpal tunnel release. The claimant had returned to work at regular duty. Dr. Bachwitt recommended 2% impairment for mild bilateral carpal tunnel syndrome.

The Board finds the report of Dr. Bachwitt is relevant, credible, material and reliable. The Board concludes that the claimant is entitled to a 2% permanent partial disability award based upon the claimant's medical records and history of mild right carpal tunnel syndrome and in light of the preponderance of the evidence standard set forth in West Virginia Code § 23-4-1g.

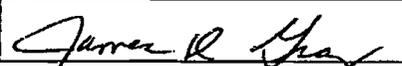
CONCLUSIONS OF LAW:

Accordingly, it is hereby ORDERED as follows:

1. The final order of the Workers' Compensation Office of Judges dated January 29, 2009, is REVERSED and VACATED.
2. The claims administrator's order dated January 21, 2008, which granted the claimant a 2% permanent partial disability award, is REINSTATED.

From any final decision of the Board, including any order of remand, an application for review may be prosecuted by any party to the Supreme Court of Appeals within thirty days from the date of this order. The appeal shall be filed with Rory L. Perry, II, Clerk of the West Virginia Supreme Court of Appeals, 1900 Kanawha Boulevard, East, Charleston, West Virginia 25305.

DATED THIS 2ND DAY OF SEPTEMBER, 2009


James D. Gray, Chairperson

cc: ALCAN ROLLED PRODUCTS - RAVENSWOOD, LLC
H. TONEY STROUD
WELLS FARGO DISABILITY MANAGEMENT
TIMOTHY E. DAVIS
EDWIN H. PANCAKE

OK 9/11
[Handwritten signature]

1-29-09

STATE OF WEST VIRGINIA
WORKERS' COMPENSATION OFFICE OF JUDGES
P.O. Box 2233, Charleston, WV 25328
Telephone (304) 558-0852

MWWP PLLC
FEB 2 2009
RECEIVED

IN THE MATTER OF:

RE: OOJ Case ID: OOJ-A308-000573

Timothy E. Davies,
CLAIMANT

JCN: 2007227492

and

CRN: 014 655648K1E272649608Q

D.O.I.: 05-18-07

Alcan Rolled Products-Ravenswood, LLC,
EMPLOYER

DECISION OF ADMINISTRATIVE LAW JUDGE

PARTIES:

Claimant, Timothy E. Davies, by counsel, Thomas P. Maroney
Employer, Alcan Rolled Products-Ravenswood, LLC, by counsel,
H. Toney Stroud

ISSUE:

The claimant protested the Claims Administrator's Order of January 21, 2008, which granted a 2% award.

DECISION:

The Claims Administrator's Order of January 21, 2008, is hereby REVERSED, and the claimant is GRANTED a 6% award.

RECORD CONSIDERED:

Please see attached: Record Considered

FINDINGS OF FACT:

1. The claimant, a millwright, developed pain and weakness in his right hand and forearm. Treatment was sought from Dr. Russell Clarke of the Holzer Clinic and the diagnosis was of moderately severe right carpal tunnel syndrome.
2. The claim was ruled compensable.

E

3. At the request of the Claims Administrator an independent medical evaluation was conducted by Dr. Bachwitt on January 3, 2008. The report notes the claimant underwent a right carpal tunnel release by Dr. Clarke on September 5, 2007. The claimant was found to have reached maximum medical improvement with a good result from the right carpal tunnel release. The doctor noted some mild decreased sensation over the median distribution on the right. Pursuant to the Table 16 of the AMA Guides, Fourth Edition, the doctor found a 6% whole-person impairment. However, the physician then interpreted Title 85-20-64.5 to establish a range of impairment with 6% being the maximum for each affected hand. Dr. Bachwitt opined that mild carpal tunnel syndrome would equate to 1% to 2%, moderate 3% to 4% and severe 5% to 6%. The doctor noted that the aforesaid breakdown was taken from a Workers' Compensation meeting he attended on September 16, 2005. Since the claimant was found to have mild carpal tunnel syndrome, a 2% impairment was recommended.

4. The Claims Administrator's Order of January 21, 2008 granted a 2% award and the claimant filed a timely protest.

5. The September 16, 2005 presentation by Darren Olofson, an attorney for the former Workers' Compensation Commission, set forth the argument that Title 85-20-64.5 was meant to establish the aforesaid range of impairment for carpal tunnel syndrome that was cited by Dr. Bachwitt.

6. On March 17, 2008, claimant's counsel sent a letter to the Claims Administrator stating that there is no provision in Rule 20 for modification of an award other than capping the maximum amount allowed.

7. Employer's counsel submitted a closing argument contending that since the claimant has been diagnosed with mild carpal tunnel syndrome, he is entitled to a 2% award.

8. Claimant's counsel submitted a closing argument contending that the report of Dr. Bachwitt supports the granting of a 6% award.

DISCUSSION:

W. Va. Code §23-4-1g provides that the resolution of any issue shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. No issue may be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed

because they are remedial in nature. If, after weighing all of the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

An issue presented by this case requires interpretation of the provisions of 85 CSR 20, §§64.1 and 64.5: range of impairments for carpal tunnel syndrome. Differing interpretations have been advanced by the parties. Depending upon how these sections are interpreted, carpal tunnel impairment awards may either be no more than 6% PPD per hand, or must be prorated somewhere between 0% and 6% per hand.

Section 64.1 establishes the manner by which certain PPD awards are determined pursuant to West Virginia Code Section 23-4-3b (b). This rule specifically includes spine impairments, carpal tunnel impairments, and psychiatric impairments. The language in §64.1, *inter alia*, is as follows:

"Once an impairment level has been determined by range of motion assessment that level will be compared with the ranges set forth below. Permanent disability assessments in excess of the range provided in the appropriate category as identified by the rating physician shall be reduced to the within (sic) the ranges set forth below:"

Section 64.5 establishes the range of awards for impairment due to carpal tunnel syndrome as 0%-6% for each affected hand.

Carpal tunnel syndrome impairment, according to the A.M.A. Guides, 4th Edition, is determined by using either of two alternative methods. One method involves detailed measurements of sensory loss and/or motor deficit for individual fingers and areas of the hand which are then adjusted by a factor provided in Table 15. The second method involves using Table 16 and applying the subjective degree of severity of involvement of each major nerve. Table 16 results in four levels of impairment (none, mild, moderate, and severe) and yields whole-person impairment ratings of 0%, 6%, 12%, and 24% respectively.

The language used in §64.1 is somewhat problematic. First, it requires the use of the "range of motion assessment" methodology. However, "range of motion assessment" is applicable only to the spinal injury chapter and is not a part of the carpal tunnel evaluation method or, for that matter, the psychiatric impairment determination process. Second, there is the problem with an apparent typographical error when the regulation requires that excess impairment be reduced "to the within the" ranges set forth.

The range of impairment adjustment for carpal tunnel impairment determined using Table 15 is not often an area of dispute. This is because Table 15 may result in impairment findings ranging between 0% and 6%, which, according to the Rule, do not require award reduction.

Impairment calculations based upon Table 16 can result in differing interpretations of §64. According to one interpretation, Table 16 must first be used to determine the degree of impairment and then, if the resulting award is in excess of the allowable range of awards, be reduced to within the range. Under such an interpretation, first the impairment rating must be determined. Then the impairment rating is reduced to within the range. Under this interpretation, 6% impairment would become a 6% award because the 6% award is not "in excess of the range provided" pursuant to §64.5. However, a finding of 12% impairment, "in excess of the range provided", would be reduced and would also become a 6% award. Thus, the maximum award for carpal tunnel syndrome for either hand is 6%.

According to another interpretation, impairment awards must be prorated so that the results are between 0% and 6% inclusively. Using an apparently straightforward mathematical calculation, proponents of this interpretation have created classifications of awards: 0%; 1%-2%; 3%-4%; and 5%-6%. All carpal tunnel awards must be adjusted to fit one of these classifications.

An immediate problem created for adoption of the latter interpretation is the actual language of the regulation. The regulation requires that the degree of impairment be first determined and only those awards in excess of the range be adjusted. Thus, using Table 16, a mild degree of impairment yields a 6% whole-person impairment. 6% impairment is not in excess of the range so no modification is required and the 6% impairment becomes a 6% award.

On the other hand, a moderate degree of impairment yields a 12% whole-person impairment. Since 12% is in excess of 6%, it must be reduced to within the range of awards. The proponents for prorated awards suggest that this impairment, in the middle of the range, should be a 3% to 4% award. No explanation is offered as to how to determine what should be a 3% award as opposed to a 4% award. Even more problematic is the consequence that a moderate degree of impairment yields an award (3%-4%) that is less than the award (6%) resulting from a minimal degree of impairment.

To avoid such a legal and medical absurdity, the prorating might be done at a different step of the process. Table 16, itself, could have the impairment levels modified from 6%, 12% and 24% to 1%-2%, 3%-4%, and 5%-6%. Such a modification would result in impairment calculations which would never require an award reduction since all calculations would fall within the range of awards. However, the regulation requires that the impairment be first determined and then modified if in excess of the range of awards. Nothing in the regulation requires, or even permits, a modification of the impairment determinations. Only the awards are modified to fit within the ranges, not the impairments.

Therefore, the Office of Judges interprets 85 CSR 20 §§64.1 and 64.5 to mean that impairments in excess of 6% will have the awards reduced to 6%. This means that carpal tunnel awards will never be greater than 6% per hand. Table 16 is not to be modified to provide for lower, pro rated, impairment determinations. However, impairments of 6% or less, as may be determined by Table 15 methodology, will result in awards equal to the impairment level determined. Upon consideration of the aforesaid, it is found that the report of Dr. Bachwitt supports the granting of a 6% award in this claim.

CONCLUSIONS OF LAW:

1. The claimant has sustained a 6% permanent partial disability attributable to carpal tunnel syndrome in this claim.
2. The Claims Administrator erred in entering its Order of January 21, 2008.

Accordingly, the Claims Administrator's Order of January 21, 2008, is hereby REVERSED, and the claimant is GRANTED a 6% award.

APPEAL RIGHTS:

Under the provisions of W.Va. Code §23-5-12, any aggrieved party may file a written appeal writing thirty (30) days after receipt of any decision or action of the Administrative Law Judge. The appeal shall be filed with the Board of Review at P.O. Box 2628, Charleston, WV, 25329.

DATE: January 29, 2009


Joseph Mancuso, Deputy Chief
Administrative Law Judge

JAMJR:pr:dh:tlh

cc: Alcan Rolled Products - Ravenswood Llc
H Toney Stroud
Wells Fargo Disability Management
Timothy E Davies
Thomas Patrick Maroney

Case ID: A308-000573 (2007227492)

Date: January 29, 2009

RECORD CONSIDERED**Issue:**

The claimant's protest to the Claims Administrator's Order dated January 21, 2008, regarding PERMANENT PARTIAL AWARD.

EVIDENCE SUBMITTED:**Claimant Evidence:**

<u>Document Type</u>	<u>Author</u>	<u>Date of Document</u>	<u>Date Submitted</u>
Document Not Medical	EDWIN H. PANCAKE, ESQ.	03/17/2008	03/17/2008

Employer Evidence:

<u>Document Type</u>	<u>Author</u>	<u>Date of Document</u>	<u>Date Submitted</u>
Doctor Report	PAUL BACHWITT, MD	01/07/2008	03/26/2008
Document Not Medical	BLUE RIBBON PANEL TRAINING	09/16/2005	03/26/2008

ADDITIONAL INFORMATION:**Closing****Arguments:**

<u>Party Submitted</u>	<u>Date of Letter</u>
Claimant	04/28/2008
Employer	12/29/2008