IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

TIMOTHY E. DAVIES,

Petitioner,

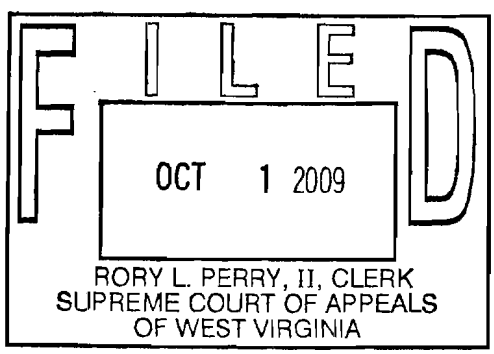
vs.

APPEAL NO: 2042608
CLAIM NO. 2007227492

ALCAN ROLLED PRODUCTS – RAVENSWOOD, LLC

Respondent.

PETITION FOR APPEAL
from an order of the
WORKERS' COMPENSATION BOARD OF REVIEW
certified on September 2, 2009



EDWIN H. PANCAKE
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October 1, 2009

PETITION FOR REVIEW

TYPE OF APPEAL

The claimant/petitioner, Timothy E. Davies, petitions for review of the September 2, 2009, order of the Workers' Compensation Board of Review which reversed the January 29, 2009, decision of the Workers' Compensation Office of Judges which granted the claimant a 6% permanent partial disability award and reinstated the January 21, 2008, order of the Self-Insured Employer which had granted the claimant a 2% award. The claimant asserts that he is entitled to a 6% award and that the Board of Review erred in reinstating the 2% award.

STATEMENT OF THE CASE

The claimant/petitioner, Timothy E. Davies, was employed as a steelworker for the employer and developed carpal tunnel syndrome in his right hand as the result of his employment. The claimant filed an application for workers' compensation benefits and the claim was held compensable by order dated June 5, 2007.

The claimant required surgery to treat his carpal tunnel syndrome which he underwent on his right hand on September 5, 2007. After a period of recuperation, the claimant was referred for a permanent partial disability evaluation.

For this evaluation the Self-Insured Employer arranged for the claimant to be seen by Dr. Paul Bachwitt. Dr. Bachwitt examined the claimant on January 3, 2008, and issued a report which included his opinion. Dr. Bachwitt found that the claimant had 6% whole-person impairment pursuant to the AMA Guides, Fourth Edition, after reviewing his impairment according to Table 16. However Dr. Bachwitt then interpreted 85 CSR 20-64.5 to establish a range of impairment from 0% to 6%, with 6% being the maximum for each affected hand. Dr. Bachwitt then applied this interpretation to the claimant's impairment under the AMA Guides, and opined that mild carpal tunnel syndrome would equate to 1% to 2%, moderate 3% to 4% and severe 5% to 6%. Because the claimant had mild decreased sensation, Dr. Bachwitt opined that he was

entitled to a 2% award pursuant to 85 CSR 20.

By order dated January 21, 2008, the Self-Insured Employer granted the claimant a 2% award pursuant to Dr. Bachwitt's report. The claimant protested this order.

In support of his protest, the claimant tendered an Argument in Lieu of Evidence asserting that the report of Dr. Bachwitt supported a 6% award to the claimant and it should not have been reduced based upon an improper interpretation of the administrative rule. In response, counsel for the employer tendered a Closing Argument in support of the 2% award.

After the expiration of the time frame, the protest was submitted for a decision to the Office of Judges. By decision dated January 29, 2009, the Administrative Law Judge reversed the decision of the Administrator granting the claimant a 2% award and, instead, granted the claimant a 6% award on the grounds that Dr. Bachwitt's interpretation of 85 CSR 20-64.5 was incorrect and that the claimant was entitled to receive a 6% award pursuant to the AMA Guides. The claimant was then granted a 6% award.

The employer appealed the decision of the Administrative Law Judge to the Workers' Compensation Board of Review. By order dated September 2, 2009, the Workers' Compensation Board of Review reversed the decision of the Administrative Law Judge after finding that the Administrative Law Judge's decision was clearly wrong in its analysis and conclusions in view of the reliable, probative and substantial evidence on the whole record. Without addressing the question of Dr. Bachwitt's interpretation of 85 CSR 20-64.5, the Board of Review simply found that the report of Dr. Bachwitt was relevant, credible, material and reliable. Therefore, the Board concluded that the claimant was entitled to a 2% award based upon his medical records and history of mild carpal tunnel syndrome and reinstated the Self-Insured Employer's January 21, 2008, order. The claimant petitions for review of this order of the Workers'

Compensation Board of Review.

ASSIGNMENT OF ERROR

Did the Workers' Compensation Board of Review clearly err as a matter of law and fact in reversing the decision of the Administrative Law Judge and reinstating the Self-Insured Employer's order granting the claimant a 2% award, when he is clearly entitled to a 6% award?

ARGUMENT AND POINTS OF AUTHORITY

The Workers' Compensation Board of Review clearly erred in reversing the January 29, 2009, decision of the Administrative Law Judge which granted the claimant a 6% permanent partial disability award. It is a clear error because the decision of the Administrative Law Judge was supported by the facts, law and medical evidence, all of which directed that the claimant receive a 6% award.

In reversing the Administrative Law Judge, the Board of Review correctly stated that the issue that was presented is the amount of permanent impairment the claimant has suffered as the result of his right carpal tunnel syndrome. For this permanent impairment, the Rules require that he be evaluated pursuant to the AMA Guides, Fourth Edition. Under the Fourth edition of the Guides, the claimant is entitled to a 6% rating based upon Table 16 as Dr. Bachwitt properly found. However, Dr. Bachwitt then adjusted the impairment as directed by the AMA Guides based upon some interpretation he applied of 85 CSR 20-64.5.

This interpretation which Dr. Bachwitt used to reduce the claimant's impairment rating was first espoused by Darren Olofson an attorney for the former Workers' Compensation Commission. Lawyer Olofson conceived this interpretation of 85 CSR 20-64.5 to assert that the Rule is "meant to establish a range of impairment, with mild carpal tunnel syndrome getting 1% to 2%, moderate 3% to 4% and severe 5% to 6%." However, the Rule actually states that "an injured worker who can otherwise show entitlement to a permanent partial disability award for a carpal tunnel syndrome shall be

eligible to receive permanent partial disability of 0% to 6% in each affected hand." There is nothing established in the Rule to create different classifications for mild, moderate of severe impairment. The Rule merely serves to cap the maximum allowed permanent partial disability award for this condition. (Emphasis added).

By adopting Dr. Bachwitt's interpretation of the Rule, the Board of Review has clearly erred since there is absolutely nothing in the Guides or the Administrative Rule which directs a physician to make such adjustments, and to do so is a blatant disregard of the Guides and the Rule. In this case, the claimant has been found to suffer 6% whole-person impairment under the Guides, and, since this falls within the allowed range contained in 85 CSR 20-64.5, he is clearly entitled to the entire 6%.

The Board of Review also stated that Dr. Bachwitt's report is "relevant, credible, material and reliable." This is partly true in that Dr. Bachwitt calculates the claimant's impairment under the AMA Guides at 6%. However, this is untrue with regard to Dr. Bachwitt's interpretation of the administrative ruled which limits a claimant to a maximum of 6% impairment for each affected hand.

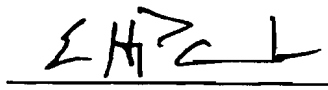
One need only review the decision of the Administrative Law Judge to see a careful and considered review and analysis of the facts and applicable law governing this issue. As the Administrative Law Judge properly found, the immediate problem created for the adoption of Dr. Bachwitt's interpretation is the actual language of the regulation. The Administrative Law Judge held that there was nothing in the regulation which requires, of even permits, a modification of the impairment determinations. Only the awards are modified to fit within the ranges, not the impairments. This is a proper analysis and is one which should have been upheld by the Board of Review.

CONCLUSION

Wherefore, the claimant/petitioner, Timothy E. Davies, respectfully requests that his petition be granted and that the Supreme Court reverse the decision of the Workers' Compensation Board of Review, and reinstate the 6% permanent partial disability

award as granted by the Administrative Law Judge.

Respectfully submitted,



Edwin H. Pancake
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Charleston, WV 25337

October 1, 2009

CERTIFICATE OF SERVICE

I, Edwin H. Pancake, counsel for Petitioner herein, do hereby certify that I served the foregoing Petition upon the following by hand delivery and/or by mailing a true and accurate copy of the same via the United States Mail, postage prepaid, on this the 1st day of October, 2009.

HAND DELIVERY:

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