

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

FILED

October 7, 2015

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

ROBERT BARIA,
Claimant Below, Petitioner

vs.) **No. 15-0056** (BOR Appeal No. 2049617)
(Claim No. 2012013224)

CAPITOL BEVERAGE COMPANY,
Employer Below, Respondent

MEMORANDUM DECISION

Petitioner Robert Baria, by Reginald Henry, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Capitol Beverage Company, by Matthew Williams, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated December 23, 2014, in which the Board affirmed a July 17, 2014, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's January 11, 2013, decision granting Mr. Baria an 8% permanent partial disability award and instead granted him a 9% 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. Baria sustained a crush injury to his left hand and wrist on October 16, 2011, while attempting to hitch a loaded trailer to a truck, and the claim was subsequently held compensable for a comminuted fracture of the left distal radius and multiple lacerations of the left hand. The left wrist fracture was treated with immobilization, and Mr. Baria was later prescribed a home exercise program. However, Mr. Baria continued to experience pain in the left wrist and forearm.

On January 30, 2012, an EMG of the left upper extremity was performed by Glenn Goldfarb, M.D., and Mr. Baria was diagnosed with severe median neuropathy near the left wrist and severe ulnar neuropathy at the left elbow. Marsha Lee Bailey, M.D., performed an independent medical evaluation on December 27, 2012. She opined that Mr. Baria sustained 8% upper extremity impairment as a result of range of motion abnormalities in the left wrist and 6% upper extremity impairment for loss of function of the median nerve as a result of traumatic carpal tunnel syndrome and cubital tunnel syndrome. After utilizing the Combined Values Chart contained in the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), Dr. Bailey opined that Mr. Baria sustained a total of 8% whole person impairment as a result of the October 16, 2011, injury. On January 11, 2013, the claims administrator granted Mr. Baria an 8% permanent partial disability award based upon Dr. Bailey's independent medical evaluation.

Following Dr. Bailey's evaluation, Mr. Baria underwent four additional independent medical evaluations. On May 19, 2013, Bruce Guberman, M.D., performed an independent medical evaluation. Dr. Guberman opined that Mr. Baria sustained 16% upper extremity impairment as a result of range of motion abnormalities in the left wrist, 3% upper extremity impairment as a result of range of motion abnormalities in the left elbow, 9% upper extremity impairment as a result of ulnar neuropathy at the left elbow, 2% upper extremity impairment as a result of motor deficits arising from the median nerve, and 11.4% upper extremity impairment as a result of sensory deficits arising from the median nerve. After utilizing the Combined Values Chart, Dr. Guberman opined that Mr. Baria sustained 23% whole person impairment as a result of the October 16, 2011, injury.

On June 25, 2013, Robert Walker, M.D., performed an independent medical evaluation. Dr. Walker opined that Mr. Baria sustained 18% upper extremity impairment as a result of range of motion abnormalities in the left wrist, 12% upper extremity impairment as a result of sensory and motor deficits arising from the median nerve, and 12.5% upper extremity impairment as a result of loss of function in the ulnar nerve. Dr. Walker utilized the Combined Values Chart and also opined that Mr. Baria sustained 23% whole person impairment as a result of the October 16, 2011, injury.

On January 8, 2014, A. E. Landis, M.D., performed an independent medical evaluation. Dr. Landis opined that Mr. Baria did not exhibit any range of motion abnormalities in the left elbow and further opined that there is nothing in Mr. Baria's medical record to indicate that he sustained a left elbow injury on October 16, 2011. He further opined that his evaluation did not produce any clinical manifestation of median or ulnar nerve compression. Dr. Landis then opined that Mr. Baria sustained 6% upper extremity impairment as a result of range of motion deficits in the left wrist and 10% upper extremity impairment as a result of carpal tunnel syndrome arising from minimal median nerve entrapment in the left wrist. After utilizing the Combined Values Chart, Dr. Landis opined that Mr. Baria sustained 9% whole person impairment as a result of the October 16, 2011, injury.

Finally, Jerry Scott, M.D., performed an independent medical evaluation on February 17, 2014. Dr. Scott noted that Mr. Baria has been diagnosed with carpal tunnel syndrome, which he

opined is secondary to the left wrist trauma sustained on October 16, 2011. Further, Dr. Scott noted that Mr. Baria has been diagnosed with left ulnar neuropathy but opined that there is no indication that the diagnosis of ulnar neuropathy is secondary to the October 16, 2011, injury. Dr. Scott then opined that Mr. Baria sustained 5% upper extremity impairment as a result of range of motion deficits in the left wrist and 10% upper extremity impairment as a result of carpal tunnel syndrome in the left wrist. After utilizing the Combined Values Chart, Dr. Scott also opined that Mr. Baria sustained 9% whole person impairment as a result of the October 16, 2011, injury.

In its decision reversing the January 11, 2013, claims administrator's decision, the Office of Judges held that Mr. Baria incurred 9% whole person impairment as a result of the October 16, 2011, injury and therefore granted him a 9% permanent partial disability award. The Board of Review affirmed the reasoning and conclusions of the Office of Judges in its decision dated December 23, 2014. On appeal, Mr. Baria concedes that the ulnar nerve and left elbow are not compensable body parts in the instant claim. However, he requests that the amount of his whole person impairment be recalculated utilizing the findings obtained by Dr. Guberman and Dr. Walker, exclusive of the findings each obtained regarding the ulnar nerve and left elbow.

The Office of Judges found that the reports of Dr. Guberman and Dr. Walker do not form a reliable basis for assessing the amount of Mr. Baria's whole person impairment arising from the October 16, 2011, injury because Dr. Guberman and Dr. Walker included an impairment rating for the left elbow and ulnar nerve in their assessment of the amount of Mr. Baria's whole person impairment. Although Mr. Baria requests that a calculation of the amount of whole person impairment arising from the October 16, 2011, injury be performed utilizing the findings obtained by Dr. Guberman and Dr. Walker, such a calculation would not be based upon a recommendation made by a physician because both Dr. Guberman and Dr. Walker relied on their findings of impairment in the ulnar nerve and left elbow in making their final recommendations. In *Repass v. Workers' Compensation Div.*, 569 S.E.2d 162, 171, 212 W.Va. 86, 95 (2002), this Court held that permanent partial disability awards are to be made solely on the basis of a physician's impairment evaluation. Therefore, utilizing select findings from the reports of Dr. Guberman and Dr. Walker would not form a reliable basis for assessing the amount of Mr. Baria's whole person impairment and resulting permanent partial disability award. After invalidating the reports of Dr. Guberman and Dr. Walker, the Office of Judges determined that the reports of Dr. Bailey, Dr. Landis, and Dr. Scott are entitled to equal evidentiary weight. Based upon its finding that reasonable medical experts could disagree as to which assessment of the amount of Mr. Baria's whole person impairment is correct, the Office of Judges resolved the dispute in favor of Mr. Baria and granted him a 9% permanent partial disability award as recommended by Dr. Landis and Dr. Scott. We agree with the reasoning and conclusions of the Office of Judges as affirmed by 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: October 7, 2015

CONCURRED IN BY:

Justice Robin J. Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Allen H. Loughry II

DISSENTING:

Chief Justice Margaret L. Workman