

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

**TRIPLE S. CORPORATION,
Employer Below, Petitioner**

vs.) No. 18-0010 (BOR Appeal No. 2052178)
(Claim No. 2014030848)

**DENNIS DEBOARD,
Claimant Below, Respondent**

FILED

May 21, 2018
EDYTHE NASH GAISER, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Triple S. Corporation, by Bradley A. Crouser, its attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Dennis Deboard, by Reginald D. Henry, its attorney, filed a timely response.

The issue on appeal is the amount of permanent partial disability Mr. Deboard is entitled to for his compensable injury. The claims administrator granted a 20% permanent partial disability award on September 28, 2016. The Office of Judges reversed the decision in its September 1, 2017, Order and granted Mr. Deboard a 27% award. The Order was affirmed by the Board of Review on December 22, 2017. 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. Deboard, a foreman, was injured in the course of his employment on March 25, 2014, when he slipped and fell on ice. The claim was initially held compensable for a back contusion. A lumbar MRI taken on May 16, 2014, showed a protrusion of the L4-5 disc, marginal osteophytes, mild facet hypertrophy, bulging of L3-4 and L5-S1, and mild encroachment of the lateral recesses.

Jerry Scott, M.D., performed an independent medical evaluation of Mr. Deboard on July 21, 2014. Dr. Scott noted that Mr. Deboard reported constant back pain and burning in his right leg. Dr. Scott found that the accident brought preexisting degenerative changes to light. Mr. Deboard's complaints included preexisting conditions as well as compensable conditions. Dr. Scott opined that the MRI findings are unrelated to the compensable injury, as the findings were degenerative. Given the large amount of degeneration seen on the MRI, it is obvious that the degenerative changes did not occur between the compensable injury and the MRI two months later. Dr. Scott found Mr. Deboard had reached maximum medical improvement and that any further care would be for the noncompensable degenerative changes. He assessed 6% impairment for the lumbar spine. The claims administrator granted Mr. Deboard a 6% permanent partial disability award on October 2, 2014, based on Dr. Scott's evaluation.

The claims administrator added displacement of intervertebral disc, thoracic/lumbosacral neuritis/radiculitis, and lumbosacral sprain to the claim on September 30, 2015, following an Order of the Office of Judges. Thereafter, Joseph Grady, M.D., performed an independent medical evaluation on August 23, 2016, to assess all of Mr. Deboard's compensable conditions. Dr. Grady found that Mr. Deboard had reached maximum medical improvement. Using Table 75 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993), he assessed 12% impairment. Dr. Grady found invalid range of motion for lumbar extension and flexion and found a total of 12% impairment for range of motion loss. There was no impairment for the thoracic spine. Dr. Grady placed Mr. Deboard in Lumbar Category IV of West Virginia Code of State Rules § 85-20-C (2006) and assessed a total of 20% whole person impairment. Based upon his evaluation, the claims administrator granted a 20% permanent partial disability award on September 28, 2016.

Robert Walker, M.D., performed an independent medical evaluation on January 20, 2017, in which he assessed 12% impairment using the American Medical Association's *Guides*. He found 9% impairment for lumbar range of motion loss and 4% for neurological impairment for a total of 23% whole person impairment. Dr. Walker placed Mr. Deboard in Category IV of West Virginia Code of State Rules § 85-20-C. He also assessed 5% impairment for the thoracic spine for a total recommendation of 27% whole person impairment.

On March 21, 2017, Michael Kominsky, D.C., performed an independent medical evaluation in which he assessed 12% impairment from Table 75 of the American Medical Association's *Guides*, 9% for loss of range of motion, and 5% for neurological loss. He combined these for 24% impairment. He placed Mr. Deboard in Category IV of West Virginia Code of State Rules § 85-20-C and recommended 23% impairment. He apportioned 2% to degenerative changes. For the thoracic spine, he assessed 3% impairment, placed Mr. Deboard in Category II of West Virginia Code of State Rules § 85-20-D (2006), and recommended 5% impairment. His total recommendation was 25% impairment for the lumbar and thoracic spines.

The Office of Judges reversed the claims administrator's grant of a 20% permanent partial disability award and granted Mr. Deboard a 27% award on September 1, 2017. The Office of Judges concluded that thoracic neuritis/radiculitis was found to be compensable in this claim. There were three evaluators of record who assessed Mr. Deboard's impairment. All three

evaluated the thoracic spine and Drs. Walker and Kominsky found 5% impairment for the thoracic spine. Dr. Kominsky was the only physician of record to apportion the impairment for prior degenerative changes. Dr. Grady was the only physician who did not find neurological deficits. It was determined that Dr. Walker followed the American Medical Association's *Guides* and that his evaluation was the most consistent concerning the compensable conditions. His recommendation of 27% impairment was therefore found to be the most valid assessment of Mr. Deboard's impairment. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed its Order on December 22, 2017.

After review, we agree with the reasoning and conclusions of the Office of Judges as affirmed by the Board of Review. Dr. Walker's report was reliable and followed the applicable American Medical Association's *Guides* and West Virginia Code of State Rules § 85-20 (2006). It cannot be said that the Office of Judges or Board of Review committed an error in relying on his evaluation.

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: May 21, 2018

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin J. Davis

Justice Menis E. Ketchum

Justice Allen H. Loughry II

Justice Elizabeth D. Walker