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July 12, 2023

Via E-File

Intermediate Court of Appeals
4700 MacCorkle Avenue S.E.
Charleston, WV 235304

Re: CCBCC, Inc., Petitioner vs.
Erick S. Boles, Respondent
JCN: 2020024017
ICA Case No.:23-ICA-256
DOI: 04/10/2020

Dear Sirs:

Our office represents the Respondent, Erick S. Boles, in the above-referenced claim. Please find attached for filing on behalf of the Respondent the Respondent's Brief, Appendix and Docketing Statement.

Sincerely yours,



Patrick K. Maroney
(WV State Bar No. 8956)

PKM/bj

cc: James Helsep, Esquire
Gallagher Bassett Services, Inc.
Erick S. Boles

In the
INTERMEDIATE COURT OF APPEALS
Charleston, West Virginia

CCBCC, INC.

Petitioner,

vs.

ICA No.: 23-ICA-256
JCN: 2020024017
Order Date: 05/16/2023

ERICK S. BOLES

Respondent.

RESPONDENT'S BRIEF ON BEHALF OF
ERICK S. BOLES

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TABLE OF CONTENTS

I.	TYPE OF APPEAL	1
II.	STATEMENT OF THE CASE	1
III.	ASSIGNMENT OF ERROR	2
IV.	POINTS OF AUTHORITY	3
V.	ARGUMENT	4
VI.	CONCLUSION	5

RESPONSE BRIEF
TYPE OF APPEAL

The Workers Compensation Board of Review reversed the Claim Administrator's order dated February 3, 2022, granting the Respondent/Claimant (hereinafter claimant) Erick S. Boles, an additional five (5) percentage permanent partial disability. The employer/insurance carrier appealed this decision. The claimant, believes that the Board correctly weighed the facts and did not violate any provision of W.Va. Code 23-4-9b, and therefore the Boards decision should be affirmed.

STATEMENT OF THE CASE

The claimant is a 24-year employee whose job duties required him to repetitively lift and move multiple cases and pallets of Coca Cola products throughout his shift. On April 27, 2020, while performing these duties he injured his neck, shoulder, and arm.

On May 22, 2020, the Claim Administrator denied the claimant's application for benefits. The claimant appealed this decision and on April 20, 2021, the Administrative Law Judge reversed the Claim Administrator's order and held the claim compensable for a cervical sprain. On September 17, 2021, the Board of Review affirmed the April 20, 2021, Administrative Law Judge order.

On January 6, 2022, the claimant was evaluated by Dr. Mukkamala for his occupational injury. Dr. Mukkamala found the claimant had a 7% whole person impairment and adjusted that to 3% for a pre-existing condition.

On February 3, 2022, the claimant was granted a 3% permanent partial disability award based upon Dr. Mukkamala's finding. The claimant timely protested this order.

The claimant submitted Dr. Guberman's medical examination. Dr. Guberman considered the pre-existing condition and found that there was no medical evidence of the pre-existing condition creating any symptoms or interfering with the claimant's activities of daily living. Based upon his physical examination and the claimant's impairments he recommended an 8% whole person impairment.

The employer then referred the claimant to Dr. Soulsby on February 7, 2023. Based upon his examination he found the claimant had an eight (8)% whole person impairment. He reduced the 8% to 2% based on the claimant's medical records. Dr. Soulsby's history included that the claimant, over the holiday, moved more product than on a normal day and that his range of motion was worse. But he attributed this reduction in range of motion to his pre-existing condition.

After the expiration of the time frame the protest was submitted for a decision. By decision dated May 16, 2023, the Board of Review reversed the Claim Administrator's order and granted the claimant an additional 5% permanent partial disability for this injury.

ASSIGNMENT OF ERROR

1. Did the Workers' Compensation Board of Review correctly weigh the medical examinations and facts and concluded that Dr. Guberman's permanent impairment rating is reliable and credible regarding the claimant's occupational injury?
2. Did the Workers' Compensation Board of Review correctly find that the claimant did not have any past history or complaints of prior neck injuries or

symptoms that limited the claimant's work or his activities of daily living that required medical treatment?

POINTS OF AUTHORITY

As in W.Va. Code §23-5-12a(b) the Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the Workers' Compensation Board of Review, only if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are:

- (1) In violation of statutory provisions;
- (2) In excess of statutory authority or jurisdiction of the Board of Review;
- (3) Made upon unlawful procedures;
- (4) Affected by other error law;
- (5) Clearly wrong in view of the reliable, probative, and substantial evidence of the whole record;
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In the instant claim, there must be three elements satisfied to establish a compensable personal injury. That is, the claimant must have received a personal injury in the course of his employment and resulting from that employment. Barnett v. SWCC 153 W.Va. 796, 172 S.E.2d 698 (1970).

In Duff v. Kanawha County Commission, 247 W.Va. 550, 882 S.E.2d 916 (Ct. App. 2022) the Intermediate Court of Appeals set forth factors that may be valuable in determining whether apportionment is proper. These factors include diagnostic tests and range of motion studies, medical records concerning a

history of prior complaints and interference with work or other activities of daily living.

ARGUMENT

In this case the evaluators had no prior history of diagnostic tests, range of motion studies or medical records concerning the history of prior complaints and interference of the claimant's neck affecting his work or activities of daily living. In fact, the claimant had worked twenty-four years loading, lugging, and stacking pallets of soda for the employer. He has no history of any prior workers' compensation claims or any injuries to his neck.

The Workers' Compensation Board of Review correctly reviewed the medical examinations from Drs. Guberman, Mukkamala and Soulsby. The Board correctly found that Dr. Guberman obtained a valid range of motion measurements and applied the Guides to arrive at his 8% permanent partial disability rating or an additional 5% permanent partial disability. The Board clearly reviewed the other two doctor's medical examinations and found that they incorrectly apportioned their findings under the Duff factors.

When looking at Dr. Mukkamala report, it is clear this is an arbitrary adjustment and not based on any past medical symptoms. Nor did he explain how this pre-existing condition had created any physical restrictions, limitations or required any medical care and treatment.

Dr Soulsby noted that "after unusually heavy work like around the holidays" his symptoms had gotten worse. These new findings or loss of range of motion should be attributed to an aggravation or progression of the claimant's work activities, not the pre-existing condition. Dr. Soulsby's report fails to consider the claimant is still working and performing the same task that injured him.

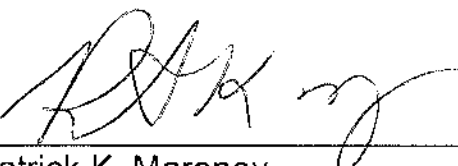
Given the above facts, the Workers' Compensation Board of Review correctly found that Dr. Guberman's report is the most reliable and credible and that the claimant, prior to this injury had no medical treatment, physical injuries, or work-related injuries to his neck or shoulder, nor did he have any range of motion impairments. Therefore, the Board of Review's decision should be affirmed.

CONCLUSION

The Workers' Compensation Board of Review correctly weighed the medical examinations and facts and concluded that Dr. Guberman's permanent impairment rating was the most reliable and credible and that the claimant did not have any medical treatment or problems with his neck or shoulder that limited the claimant physical abilities, either at work or his activities of daily living. Therefore, the claimant believes the Workers' Compensation Board of Review's decision was correct and therefore should be affirmed.

Respectfully yours,

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By 
Patrick K. Maroney

WV State Bar ID No: 8956
July 12, 2023


CERTIFICATE OF SERVICE

I, Patrick K. Maroney, counsel for Respondent/Claimant herein, do hereby certify that I served the foregoing Response Brief, Appendix, and Docketing Statement upon the following by electronic service or by mailing a true and accurate copy of the same via the United States Mail, postage prepaid, on this the 12th day of July 2023.

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