

STATE OF WEST VIRGINIA

SUPREME COURT OF APPEALS

DANIEL J. MONTE,
Claimant Below, Petitioner

vs.) **No. 11-1215** (BOR Appeal No. 2045564)
(Claim No. 2009083552)

SEVERSTAL WHEELING, INC.,
Employer Below, Respondent

FILED

May 16, 2013

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

MEMORANDUM DECISION

Petitioner Daniel J. Monte, by William C. Gallagher, his attorney, appeals the decision of the West Virginia Workers' Compensation Board of Review. Severstal Wheeling, Inc., by Lucinda Fluharty, its attorney, filed a timely response.

This appeal arises from the Board of Review's Final Order dated July 26, 2011, in which the Board affirmed a February 1, 2011, Order of the Workers' Compensation Office of Judges. In its Order, the Office of Judges reversed the claims administrator's February 8, 2010, order. 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. Daniel J. Monte was working as a crane man/laborer for Severstal Wheeling, Inc., on March 10, 2009, when he fell and injured his left wrist and left arm. On February 8, 2010, the claims administrator denied Mr. Monte any permanent partial disability. On February 1, 2011, the Office of Judges reversed the claims administrator's February 8, 2010, order and granted Mr. Monte a 2% permanent partial disability award. The Board of Review affirmed the Office of Judges' February 1, 2011, order on July 26, 2011.

Three reports were submitted to determine Mr. Monte's degree of permanent partial disability. Mr. Monte was first evaluated by Dr. Ira J. Ungar on January 27, 2010. Dr. Ungar found Mr. Monte to have reached maximum medical improvement with no impairment.

However, Dr. Ungar did not indicate that he used the American Medical Association's Guides to the Evaluation of Permanent Impairment, (4th Edition, 1993), or cite the tables which he used to determine Mr. Monte's impairment.

The second evaluation and report was done by Dr. James E. Lundeen Sr. on March 7, 2010, at the request of Mr. Monte. Dr. Lundeen concluded that Mr. Monte had a total of 13% upper extremity impairment for reduced range of motion; 6% upper extremity impairment for left grip strength; a total of 19% upper extremity impairment which converts to 11% impairment. Dr. Lundeen stated he considered the American Medical Association's Guides to the Evaluation of Permanent Impairment, but did not cite any tables that he reviewed for determining impairment.

The third evaluation and report was done by Dr. Victoria A. Langa, an orthopedic surgeon, on August 9, 2010. Dr. Langa cited the tables and the American Medical Association's Guides to the Evaluation of Permanent Impairment, in her report and found Mr. Monte had a total 2% impairment for the left wrist fracture.

The Office of Judges noted that Dr. Langa's report carefully compared her test results with the American Medical Association's Guides to the Evaluation of Permanent Impairment as required by West Virginia Code of State Rules § 85-20-64.1 and that her report best documented Mr. Monte's impairment. The Office of Judges found that by a preponderance of the evidence Mr. Monte had 2% impairment.

The Board of Review reached the same reasoned conclusion in its decision of July 26, 2011. We agree with the decision of 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: May 16, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin
Justice Robin J. Davis
Justice Margaret L. Workman
Justice Allen H. Loughry II

DISSENTING:

Justice Menis E. Ketchum