

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

CHARLESTON

TIMOTHY DAVIES,

Appellant,

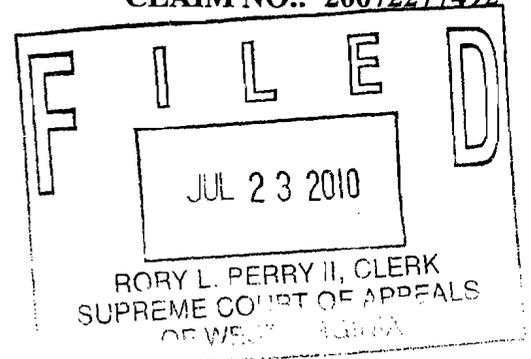
v.

ALCAN ROLLED PRODUCTS, LLC,

Appellee.

SUP. CT. NO.: 35550

CLAIM NO.: 20072277492



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APPELLEE BRIEF ON BEHALF OF  
ALCAN ROLLED PRODUCTS, LLC

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TABLE OF CONTENTS

	<u>Page</u>
NATURE OF PROCEEDING AND RULINGS BELOW .....	1
STATEMENT OF FACTS.....	2
STANDARD OF REVIEW.....	4
POINTS OF AUTHORITY.....	5
DISCUSSION.....	5
 THE PREPONDERANCE OF THE EVIDENCE ESTABLISHES THAT THE CLAIMANT HAS A 2% WHOLE PERSON IMPAIRMENT FOR HIS MILD RIGHT CARPAL TUNNEL SYNDROME.  	
PRAYER FOR RELIEF .....	8

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**NATURE OF PROCEEDING AND RULINGS BELOW**

The Appellant, Timothy E. Davies (hereinafter "claimant"), brings his appeal from the Board of Review's September 2, 2009 ruling, which reversed the Office of Judges' January 29, 2009 decision. The Office of Judges had reversed the Claims Administrator's order of January 21, 2008, granting the claimant a 2% award of permanent partial disability for the compensable injury, and, instead, granted the claimant an additional 4% award, for a total of 6%. In reversing the Office of Judges' decision, the Board of Review reinstated the Claims Administrator's order, which granted the claimant a 2% award of permanent partial disability. In bringing his appeal, the claimant asserts he is entitled to the maximum award of 6% permanent partial disability for "mild" carpal tunnel symptoms. The Appellee, Alcan

Rolled Products (hereinafter "employer") responds herein and asserts that the Board of Review's ruling is not plainly wrong as the preponderance of the evidence establishes that the claimant has a 2% whole person impairment for his mild right carpal tunnel syndrome. As such, the claimant is not entitled to an additional award of permanent partial disability in this claim.

Due to the fact that the Board of Review's September 2, 2009 ruling is not plainly wrong, the employer respectfully requests that this Honorable Court affirm the decision of the Board of Review.

#### STATEMENT OF FACTS

The claimant completed an application for benefits dated May 20, 2007, wherein he reported the development of carpal tunnel symptoms in his right wrist due to his employment duties. The claimant was initially evaluated by Dr. John Knight, who diagnosed right carpal tunnel syndrome. The claim was held compensable for right carpal tunnel syndrome and surgery was performed to correct the condition. The claimant participated in physical therapy and returned to full duty employment on November 19, 2007.

Dr. Paul Bachwitt performed an Independent Medical Evaluation on the claimant, producing a report dated January 7, 2008. Within his report, Dr. Bachwitt diagnosed the claimant with right carpal tunnel syndrome, status post right carpal tunnel release. Dr. Bachwitt noted that with regard to the claimant's compensable condition, he believed that the claimant had reached maximum degree of medical improvement and received a very good result from his right carpal tunnel release. Dr. Bachwitt noted that the claimant's Tinel's sign was negative and the two-point discrimination revealed only mild decreased sensation along the median distribution of the right hand. Bachwitt noted that the

claimant's right upper extremity motor strength was equal to that of the left and considered normal. He further noted that the claimant's reflexes were symmetrical and there was no biceps, forearm, thenar or intrinsic atrophy. It was also noted that the radial and ulnar pulses were normal bilaterally and the right wrist motions were equal to that of the left and within normal limits. In conclusion, Dr. Bachwitt determined that the claimant had mild right CTS and recommended a 2% whole person impairment.

By order dated January 21, 2008, the claimant was granted a 2% award of permanent partial disability, based upon the report of Dr. Paul Bachwitt. The claimant protested.

In support of his protest, the claimant submitted a letter from his attorney, Edwin Pancake, to the Wells Fargo claims administrator, asserting that Dr. Bachwitt erred in reducing the impairment calculation to comply with Rule 20.

There were no other medical reports suggesting any additional impairment submitted in the record.

In response to the claimant's protest, the employer submitted the aforementioned report of Dr. Bachwitt as well as a packet titled "Blue Ribbon Panel Training." Contained in the Blue Ribbon Panel<sup>1</sup> Training packet is a section pertaining to the carpal tunnel guidelines contained in Rule 20. The first full paragraph on Page 4 of the packet states, "please note that the new Rule 20 maximum of 6% per affected hand is meant to establish a range of impairment, with mild CTS getting 1-2%, moderate 3-4%, and severe 5-6%. Some physicians are continuing to find mild CTS, going to table 16 which gives 6% for mild, and finding that this is allowed under Rule 20 when it is not. Under Rule 20, mild CTS is not supposed to merit a 6%, that is for severe CTS."

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<sup>1</sup> The claimant's counsel neglected to include within his appendix the Blue Ribbon Panel document to which Dr. Bachwitt referred and which had been submitted into evidence before the Office of Judges. Thus, the document is attached for consideration by the Honorable Court.

The claim was subsequently submitted for decision. By order dated January 29, 2009, the Office of Judges reversed the Claims Administrator's order, and granted the claimant a 6% award of permanent partial disability, despite the fact that the only medical evidence contained in the record established that the claimant had a 2% whole person impairment for mild right carpal tunnel syndrome. The employer appealed.

On appeal, the Board of Review reversed the Office of Judges' January 29, 2009 decision and reinstated the Claims Administrator's January 21, 2008 order. In its decision, the Board of Review found the report of Dr. Bachwitt to be relevant, credible, material, and reliable. The Board concluded that the claimant was entitled to a 2% award of permanent partial based upon the claimant's medical records and history of mild right carpal tunnel syndrome in light of the preponderance of the evidence standard.

By order dated June 10, 2010, this Honorable Court granted the claimant's petition for appeal from the Board of Review's September 2, 2009 ruling. By letter dated June 24, 2010, the claimant announced he would allow his previously submitted petition for appeal to serve as his appellant brief on the matter.

#### STANDARD OF REVIEW

This Court has held that an order of the Appeal Board affirming the finding of the Commission will not as a general rule be set aside if there is substantial evidence and circumstances to support it. *McGeary vs. State Comp. Dir.*, 148 W. Va. 436, 135 S.E.2d 345 (1964) (emphasis added). More recently, this Honorable Court reiterated its position that it "will not reverse a finding of fact made by the Workers' Compensation Board of Review unless it appears from the proof upon which the appeal board acted that the finding is plainly wrong." *Conley v. Workers' Compensation Division*, 199 W. Va. 196, 483 S.E.2d 542 (1997). "Moreover, the plainly wrong standard of review is a deferential one, which

presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." *Id.*

### POINTS OF AUTHORITY

*McGeary vs. State Comp. Dir.*, 148 W. Va. 436, 135 S.E.2d 345 (1964)

*Conley v. Workers' Compensation Division*, 199 W. Va. 196, 483 S.E.2d 542 (1997)

West Virginia C.S.R. §85-20-65

West Virginia C.S.R. §85-20-64.5

West Virginia Code §23-4-1g

*Simpson v. WVOIC and Independence Coal Company*, 223 W. Va. 495; 678 S.E.2d 1; 2009 W. Va. LEXIS 33 (2009)

### DISCUSSION

THE PREPONDERANCE OF THE EVIDENCE ESTABLISHES THAT THE CLAIMANT HAS A 2% WHOLE PERSON IMPAIRMENT FOR HIS MILD RIGHT CARPAL TUNNEL SYNDROME.

West Virginia C.S.R. §85-20-65 states that on and after the effective date of Rule 20, all evaluations, examinations, reports and opinions with regard to the degree of permanent whole person medical impairment which an injured worker has suffered shall be conducted and composed in accordance with the AMA Guides 4th and with Rule 20. [emphasis added] Rule 20 became effective on June 14, 2004.

West Virginia C.S.R. §85-20-64.5 states that an injured worker who can otherwise show entitlement to a permanent partial disability award for carpal tunnel syndrome shall be eligible to receive a permanent partial disability award of 0%-6% in each affected hand.

West Virginia Code §23-4-1g states that for all awards made after July 1, 2003, the resolution of any issue shall be based on a weighing of all evidence pertaining to

an issue and a finding that a preponderance of the evidence supports a chosen manner of resolution. A claim for compensation must be decided on its merit and not according to any principle that requires statutes governing workers' compensation statutes to be liberally construed.

The reliable medical evidence of record establishes that the claimant is entitled to a 2% award of permanent partial disability resulting from his mild right CTS. This was established by Dr. Bachwitt, who evaluated the claimant on January 3, 2008, and was the only physician of record to give an impairment recommendation.

Upon examination of the claimant, Dr. Bachwitt diagnosed the claimant with right carpal tunnel syndrome, status post right carpal tunnel release. Dr. Bachwitt noted that with regard to the claimant's right carpal tunnel syndrome, he believed that he had reached maximum degree of medical improvement and had received a very good result from his right carpal tunnel surgery. Dr. Bachwitt noted that the claimant's Tinel's sign was negative and the two-point discrimination revealed only mild decreased sensation along the median distribution of the right hand. Bachwitt noted that the claimant's upper extremity motor strengths were strong and equal bilaterally and his grip strength was reasonable. He further noted that the claimant's reflexes were symmetrical and there was no biceps, forearm, thenar or intrinsic atrophy. It was also noted that the radial and ulnar pulses were normal bilaterally and the claimant's wrist motions were also normal bilaterally. In conclusion, Dr. Bachwitt determined that the claimant had mild right carpal tunnel syndrome and recommended a 2% whole person impairment.

In calculating his 2% whole person impairment, Dr. Bachwitt referenced W.Va. C.S.R. §85-20-64.5, which states that the maximum for each hand is 6%, meaning that the absolute worst case of carpal tunnel syndrome should be granted a 6% award. Dr.

Bachwitt went on to state that a maximum of 6% per hand is meant to establish a range of impairment with mild carpal tunnel symptoms getting 1-2%, moderate 3-4%, and severe 5-6%. Dr. Bachwitt also cited notes from a Workers' Compensation meeting he attended on September 16, 2005, where the aforementioned was discussed [See the Blue Ribbon Panel Packet submitted into evidence by the employer]. Accordingly, as shown by the claimant's examination, since he only had mild right carpal tunnel syndrome and obtained a very good result from his right carpal tunnel release, Dr. Bachwitt recommended a 2% whole person impairment to be in line with the range for mild impairment.

There were no other medical reports submitted into the record. Thus, the Claims Administrator's January 21, 2008 order, which granted the claimant a 2% award of permanent partial disability for mild right carpal tunnel syndrome, was properly reinstated by the Board of Review.

The claimant's counsel argues the range of impairment referenced in Rule 20, promoted by the Blue Ribbon Panel, and utilized by Dr. Bachwitt, is without foundation or merit. The claimant's counsel argues that the AMA Guides 4<sup>th</sup> Edition must be referenced first, then contrasted with the ranges of impairment offered by Rule 20. While this may be true for spinal impairment ratings, it would be an effort in futility to do so with regards to carpal tunnel. In reference to Table 16 on page 57 of the AMA Guides 4<sup>th</sup>, the *minimum* one can obtain for carpal tunnel is 10% upper extremity impairment, which equates to 6% whole man impairment. By the claimant's notion, every single carpal tunnel claim should warrant 6% per wrist, regardless of whether the residual symptoms are mild, moderate, or severe.

The authors of Rule 20 did not construct the language of §85-20-64.5 in such a manner that supports the claimant's argument. Rather, the language specifically provides for a range of zero to six percent, without delineating the level of symptom severity for each

percentage. If the authors of Rule 20 intended a physician to continue to consult the AMA Guides first then apply Rule 20, which would always result in a 6% award, then why give an option for 0%-6%? The claimant's argument fails to address this discrepancy. It is plainly obvious Rule 20 intended to give a range of zero to six percent. Logically, that range could be extrapolated to assign 0-2% for mild, 3-4% for moderate, and 5-6% for severe residual symptoms.

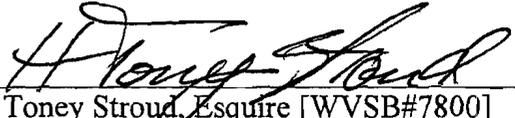
In *Simpson v. WVOIC and Independence Coal Company*, 223 W. Va. 495; 678 S.E.2d 1; 2009 W. Va. LEXIS 33 (2009), the Supreme Court held that the ranges for cervical, thoracic and lumbar spine impairment ratings provided by Rule 20 were appropriate limitations to the recommendations found in the AMA Guides. To remain consistent, the reasoning behind the Court's decision in *Simpson*, should be applied.

In sum, the preponderance of the evidence establishes that claimant is entitled to a 2% award of permanent partial disability for mild right carpal tunnel syndrome as there is no other medical opinion on record. Further, the claimant's argument establishes that a claimant would always be granted a 6% award per wrist for carpal tunnel, which was obviously not the intent of the range provided in Rule 20. As such, the employer respectfully requests that this Honorable Court affirm the decision of the Board of Review.

**PRAYER FOR RELIEF**

Based on the foregoing, the employer asserts the claimant's argument fails to establish that the Board of Review was plainly wrong and thus, the decision of the Board of Review should be affirmed.

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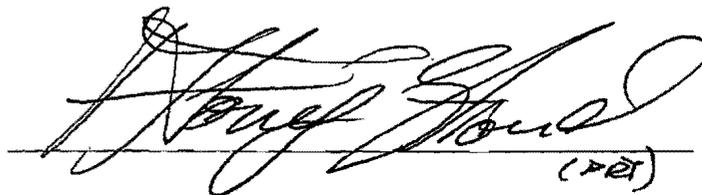
ALCAN ROLLED PRODUCTS, LLC,

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that I have this 23<sup>rd</sup> day of July, 2010, served the foregoing "Appellee Brief on Behalf of Alcan Rolled Products, LLC," upon all counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, in an envelope properly addressed as follows:

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(per)