

**STATE OF WEST VIRGINIA**

**SUPREME COURT OF APPEALS**

**SAMUEL LORIA,  
Claimant Below, Petitioner**

**vs.) No. 18-0467** (BOR Appeal No. 2052313)  
(Claim No. 2015030273)

**MATTHEWS LUBRICANTS, INC.,  
Employer Below, Respondent**

**FILED**

**November 2, 2018**

EDYTHE NASH GAISER, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**MEMORANDUM DECISION**

Petitioner Samuel Loria, by Stacey Fragile and Stephen New, his attorneys, appeals the decision of the West Virginia Workers' Compensation Board of Review. Matthews Lubricants, Inc., did not file a timely response to the petition for appeal.

The issues on appeal are compensability of cervical conditions and the amount of permanent partial disability in the claim. On September 2, 2016, the claims administrator granted Mr. Loria an 11% permanent partial disability award. The Workers' Compensation Office of Judges affirmed the claims administrator's decision in an Order dated November 3, 2017. The Board of Review affirmed the decision of the Office of Judges in an Order dated April 23, 2018. 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. Loria sustained a personal injury on May 11, 2015, in the course of and resulting from his employment. He was refilling a tank with oil when the tank collapsed causing him to fall fifteen to eighteen feet to the ground. He struck his forehead and chin resulting in lacerations to both. When he fell, his right hand was stuck in the rungs of the ladder while his left hand and arm were outstretched. As a result, he suffered injuries to both wrists and his right thumb. He was transported to United Hospital Center's Emergency Department. Mr. Loria was diagnosed as

having suffered a left radius fracture, facial lacerations, and contusions of the right hand. His left arm was placed in a cast. United Orthopedics made a preliminary diagnosis of carpal tunnel symptoms caused by the swelling in his wrist and his right thumb was placed into a spica splint.

Chuanfang Jin, M.D., with West Virginia University Department of Occupational Medicine conducted an independent medical evaluation on August 15, 2016. Dr. Jin did not find clinical evidence of a cervical spine injury. Dr. Jin referenced an MRI of the cervical spine which was conducted on November 17, 2015, which revealed multiple levels of degenerative disease at C5-6, C6-7 and C3-4. Dr. Jin also opined that the medical evidence suggests that Mr. Loria's right thumb neurological symptoms are likely due to his median nerve contusion rather than C6-7 radiculopathy. Utilizing the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, (4<sup>th</sup> ed. 1993), Dr. Jin found no ratable impairment for Mr. Loria's left wrist and elbow injuries. For the right thumb, he was found to have 11% upper extremity impairment for decreased range of motion and partial sensory loss. For the right wrist, Mr. Loria was found to have 9% upper extremity impairment for decreased range of motion. After adding Mr. Loria's upper extremity impairments and converting to whole person impairment, Dr. Jin found a combined total of 11% whole person impairment for Mr. Loria's injuries. Based upon Dr. Jin's assessment, the claims administrator granted Mr. Loria an 11% permanent partial disability award in an Order dated September 2, 2016.

Mr. Loria submitted an independent medical evaluation report from David Soulsby, M.D., dated December 15, 2018. Dr. Soulsby was of the opinion that Mr. Loria had suffered a herniated disc at C5-6 with right-sided C6 radiculopathy, a left wrist fracture, a right hand contusion, bilateral carpal tunnel syndrome, and De Quervain's tenosynovitis. Dr. Soulsby opined that Mr. Loria was not at maximum medical improvement for his cervical pathology. Using the American Medical Association's *Guides*, Dr. Soulsby found 29% whole person impairment for decreased range of motion, significant sensory loss, and motor deficits in the right upper extremity. He found an additional 6% whole person impairment of the cervical spine. Combining Mr. Loria's right upper extremity and cervical impairments, Dr. Soulsby found a combined total of 33% whole person impairment for the compensable injuries.

Kelly Agnew, M.D., authored an independent medical evaluation report dated February 8, 2017. Dr. Agnew opined that there was no evidence that Mr. Loria sustained a cervical injury as a result of the compensable injury. He noted that the emergency room records on the date of injury made no mention of cervical complaints. He also noted that there was no mention of cervical complaints by any medical provider until more than ten weeks after the compensable injury. Dr. Agnew further noted that EMG studies of Mr. Loria's upper extremity revealed no electrodiagnostic evidence of cervical radiculopathy. Using the American Medical Association's *Guides*, Dr. Agnew combined and converted Mr. Loria's impairment and found a combined total of 6% whole person impairment for the compensable injury. Because Mr. Loria had already been granted an 11% permanent partial disability award, Dr. Agnew concluded that he had been fully compensated for his compensable injuries.

The Office of Judges considered the three independent medical evaluation reports in the record. Dr. Jin found Mr. Loria to have 11% whole person impairment for range of motion

deficits in the right thumb and right wrist. Dr. Soulsby found Mr. Loria to have a total of 33% whole person impairment for range of motion deficits and significant sensory loss in the right upper extremity and cervical spine. In his IME report, Dr. Agnew found 6% whole person impairment for range of motion deficits in the left wrist and right thumb. Because Dr. Soulsby's assessment was over 20% points greater than the impairment ratings of Drs. Jin and Agnew, his report was labeled an outlier amongst the impairment assessments. The Office of Judges also found that Dr. Soulsby's impairment recommendation includes ratings for non-compensable cervical spine conditions. The Office of Judges concluded that Dr. Soulsby's impairment rating does not provide an accurate or reliable assessment of Mr. Loria's compensable impairment in the claim. Mr. Loria was granted an 11% permanent partial disability award based upon Dr. Jin's recommendation. Dr. Agnew opined that Mr. Loria had been fully compensated by his 11% award. The Office of Judges reasoned that the claims administrator's Order of September 2, 2016, must be affirmed as Mr. Loria failed to show by a preponderance of evidence that he has more than 11% permanent partial disability in this claim. The Board of Review adopted the findings and conclusions of the Office of Judges and affirmed the decision of the Office of Judges in an Order dated April 23, 2018.

After review, we agree with the opinion of the Office of Judges, as affirmed by the Board of Review. Dr. Agnew considered the issue of cervical spine impairment and concluded that there is no evidence of a cervical injury at which any impairment could be assessed. Mr. Loria's medical history on the date of injury does not note complaints of neck pain. There was no cervical tenderness and his range of motion was measured as being normal. Dr. Agnew concluded that there is no evidence of disc herniation with or without accompanying radiculopathy. An MRI of the cervical spine was performed on November 17, 2015, and revealed mild degenerative disc changes and a mild bulge at C6-7. Dr. Agnew reported that the MRI reveals changes quite normal in a 46-year old spine. It does not appear that Mr. Loria has shown by a preponderance of the evidence that he is entitled to an additional permanent partial disability award in this claim.

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:** November 2, 2018

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman  
Justice Elizabeth D. Walker  
Justice Paul T. Farrell sitting by temporary assignment  
Justice Tim Armstead  
Justice Evan H. Jenkins

Justice Allen H. Loughry II suspended and therefore not participating.