Cork, Melvin, Jr.

EVIDENCE

Documents

In the event a party timely objects to a document offered under ER 904, the document shall be rejected if it is inadmissible under other rules of evidence. ***….In re Melvin Cork, Jr.*, BIIA Dec., 95 1341 (1996) [**dissent]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MELVIN L. CORK, JR.	**DOCKET NO. 95 1341**
CLAIM NO. N-543196	**DECISION AND ORDER**

APPEARANCES:

Claimant, Melvin L. Cork, Jr., by
Casey & Casey, P.S., per
Gerald L. Casey

Employer, K Ply, Inc., by
Timber Operators Counsel, per
Paul H. Proctor

Department of Labor and Industries, by
The Office of the Attorney General, per
Erik S. Rohrer, Assistant

The claimant, Melvin L. Cork, Jr., filed an appeal with the Board of Industrial Insurance Appeals on March 9, 1995, from an order of the Department of Labor and Industries dated February 3, 1995. The order affirmed a Department order dated August 2, 1994, that closed the claim with time-loss compensation as paid to January 16, 1994, and made no award for permanent partial disability. **REVERSED AND REMANDED.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the worker to a Proposed Decision and Order issued on January 3, 1996, in which the order of the Department dated February 3, 1995, was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and the rulings are affirmed, except for the December 1, 1995 admission of Exhibit No. 1, which appears to be a letter from Alvin Harris, M.D. On November 3, 1995, the Department filed a Notice of Intent to Offer a Document under Superior Court Evidence

Rule 904. That rule provides a method by which a party can admit certain documents if notice is given at least 30 days prior to trial. Parties must then object within 14 days. Here, claimant's counsel objected in writing on November 13, 1995, on the grounds that the document was a conclusion and was not the type of facts and data referenced in the rule. At the December 1, 1995 hearing, claimant's counsel also objected on the ground of lack of opportunity for cross-examination. We believe that the document should not have been admitted. ER 904(c) states, "In the event of objection, the document shall be admitted into evidence *only in accordance with the other rules of evidence*." (Emphasis added.) Mr. Casey made a written objection well within the 14 day time limit. The written objections were sufficient to put the Department on notice that the claimant would challenge the document's admission as an out-of-court conclusion of an expert witness. The document contains a statement by an unsworn medical expert, and, if admitted, would eliminate Mr. Cork's right of cross-examination. We sustain the claimant's objection to the admission of Exhibit No. 1, under ER 611(b) *Mode and Order of Interrogation and Presentation--Scope of Cross Examination,* ER 702 *Testimony by Experts,* and ER 802 *Hearsay Rule*. We will now briefly summarize the facts.

Mr. Cork is a 41-year-old, right-handed laborer who has worked for K Ply mill for five years. While at work on July 6, 1993, the claimant hit his right elbow on a piece of metal. After conservative care failed to reduce his symptoms, Mr. Cork underwent a lateral epicondylectomy for a chip fracture on December 2, 1993. In the surgery, the doctor removed portions of bone and ligament from Mr. Cork's right elbow. Since the surgery, the claimant has returned to his job at the plywood mill, but he explained that he has had weakness, pain, swelling, and numbness in the elbow. His wife and a co-worker confirmed his description of elbow problems.

Guy Earle, M.D., evaluated Mr. Cork on August 2, 1995. He used a hand dynamometer that revealed decreased grip strength in the right arm when compared to the left. Dr. Earle validated

the loss of strength by having Mr. Cork alternate hands during the tests, and by repeated testing. Dr. Earle rated the impairment at 10 percent of the amputation value of the right arm at the elbow. He explained that when he conducts such disability evaluations, he rates the loss of function in a patient, and he stated that elbow pain can create a significant disability, even with a full range of motion. The doctor acknowledged that the American Medical Association's, *Guides to the Evaluation of Permanent Impairment* states that strength testing is influenced by subjective factors that are difficult to control, and that strength testing is rarely used as a basis to rate disability. However, Dr. Earle also testified that the use of strength testing is a matter of a doctor's judgment, discretion and approach to disability.

John Osgood, M.D., evaluated Mr. Cork on December 3, 1994. He also used a dynamometer to compare the claimant's loss of strength in his arms. Mr. Cork had a full range of motion in his arms and hands, and he had no sensory loss. The tests revealed a loss of right arm strength. Nonetheless, the doctor did not rate any percentage of impairment, explaining that he only considers grip strength test results if he also finds atrophy. Dr. Osgood admitted that an individual can have a loss of strength without atrophy. Furthermore, he stated that one definition of impairment is the loss of physical function, and that the loss of strength is the loss of function. Finally, Dr. Osgood agreed that Mr. Cork should avoid repetitive activities that cause stressful actions to his right hand.

Mr. Cork seeks a permanent partial disability award for his right arm. The legal definition of disability under industrial insurance law is well established in Washington. The Supreme Court has explained, "Disability means the impairment of the workman's mental or physical efficiency. It embraces any loss of physical or mental functions which detracts from the former efficiency of the individual in the ordinary pursuits of life." *Henson v. Department of Labor & Indus.,* 15 Wn.2d 384, 391 (1942). The grip strength tests of Dr. Osgood and Dr. Earle confirmed a loss of function in Mr.

Cork's right arm related to the industrial injury and surgery. Dr. Osgood admitted that the loss of strength can be seen as the loss of function, and Dr. Earle relied upon strength testing as a matter of his judgment. The accepted AMA impairment rating guide does not prohibit reliance on strength testing. The loss of bone and ligament tissue from Mr. Cork's elbow through surgery provides an objective basis for and evidence of Dr. Earle's conclusions. Thus, the record supports Dr. Earle's impairment rating of 10 percent of the amputation value of the right arm distal to the elbow. We note that the admission of Exhibit No. 1 would not change our decision since the document is merely an adoption of Dr. Osgood's opinions, some of which have been shown to be inconsistent with the application of industrial insurance law to the facts of this appeal.

In conclusion, the order of the Department of Labor and Industries dated February 3, 1995, that affirmed its August 2, 1994 order that closed the claim without a permanent partial disability award is reversed. The claim is remanded to the Department to issue an order paying a permanent partial disability award of 10 percent of the amputation value of the right arm at any point from below the elbow joint distal to the insertion of the biceps tendon to and including mid-metacarpal amputation of the hand.

FINDINGS OF FACT

1. On July 21, 1993, the Department of Labor and Industries received an application for benefits from the claimant, Melvin L. Cork, Jr., alleging that he sustained an industrial injury on July 6, 1993, while he was working for K Ply, Inc. The claim was allowed and benefits provided.

   On August 2, 1994, the Department issued an order that closed the claim with time-loss compensation as paid to January 16, 1994, and without an award for permanent partial disability. The claimant protested on September 23, 1994, and the Department held the August 2, 1994 order in abeyance.

   On February 3, 1995, the Department issued an order affirming its August 2, 1994 order. On March 9, 1995, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On April 10, 1995, the Board issued an order granting the appeal and assigning Docket No. 95 1341.

2. On July 6, 1993, Mr. Cork injured his right elbow when he struck it on a sharp piece of metal while working at K Ply, Inc. On December 2, 1993, he underwent surgery to his right elbow described as a lateral epicondylectomy in which bone and ligament tissue were removed.

3. As of February 3, 1995, Mr. Cork's right elbow condition proximately caused by the injury of July 6, 1993, was fixed and stable. The condition resulted in weakness, pain, swelling, and numbness in the right elbow, and is best rated at 10 percent of the amputation value of the right arm at any point from below the elbow joint distal to the insertion of the biceps tendon to, and including, mid-metacarpal amputation of the hand.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction of the subject matter and the parties of this appeal.

2. As of February 3, 1995, Mr. Cork had a permanent partial disability proximately caused by the July 6, 1993 industrial injury that was best rated at 10 percent of the amputation value of the right arm at any point from below the elbow joint distal to the insertion of the biceps tendon to, and including, mid-metacarpal amputation of the hand.

3. The order of the Department of Labor and Industries dated February 3, 1995, that affirmed its order dated August 2, 1994, that closed the claim with time-loss compensation as paid to January 16, 1994, and without further award for time-loss compensation or permanent partial disability is incorrect and is reversed. The claim is remanded to the Department to issue an order closing the claim with time-loss compensation as paid to January 16, 1994, and paying a permanent partial disability award of 10 percent of the amputation value of the right arm at any point from below the elbow joint distal to the insertion of the biceps tendon to, and including, mid-metacarpal amputation of the hand.

It is so ORDERED.

Dated this 15th day of April, 1996.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

DISSENT

I dissent. The Proposed Decision and Order reached the correct result and should be adopted as this Board's final Decision and Order.

Judge Williams' discussion of the evidence is thorough and supports her decision. She found Dr. Osgood's testimony persuasive, and so do I. I believe the admission of Dr. Harris' written report, although arguably improper at the most, is de minimis error as a trifling matter, and is more likely admissible under ER 904. Dr. Harris' letter adds nothing to the record that is of probative value and certainly means nothing to my analysis and conclusion. Dr. Osgood's opinion is persuasive. As the court stated in *Hoff v. Department of Labor & Indus.*, 198 Wash. 257 (1939), these industrial injury cases should be disposed of with as little technical formality as possible. The Proposed Decision and Order properly affirmed the Department order. That decision should not be disturbed.

Dated this 15th day of April, 1996.

/s/_____
ROBERT L. McCALLISTER Member