UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0936

September Term, 2014

SHERRY EVANS

v.

CITY OF ROCKVILLE, ET AL.

Zarnoch,
Wright,
Hotten,

JJ.

Opinion by Wright, J.

Filed: May 7, 2015

After an injury on her job on January 5, 2009, appellant, Sherry Evans, filed for temporary disability workers' compensation benefits from her employer, appellee, City of Rockville ("City"), with the Workers' Compensation Commission ("Commission"). Evans received temporary total disability benefits from January 6, 2009, to May 12, 2011, and from August 10, 2011, to August 22, 2012. Evans applied for permanent total disability benefits with the Commission and impleaded appellee, Subsequent Injury Fund ("SIF"), alleging that her disability was substantially greater because of the combined effects of a previous injury and the subsequent injury of January 5, 2009. On September 4, 2013, the Commission issued an award, determining that Evans sustained, under "Other Cases," a 40 percent industrial loss of use of the body, 20 percent as a result of the accidental injury (lower back), and 20 percent due to a pre-existing condition. Evans appealed the Commission's findings to the Circuit Court for Montgomery County and demanded a jury trial. At the conclusion of a three-day jury trial, on June 4, 2014, the jury affirmed the Commission's decision. Evans appealed and presents two issues:

> 1. Did the trial court err in allowing expert medical testimony that Ms. Evans did not suffer an injury on January 5, 2009?
>
> 2. Did the trial court err in submitting to the jury issues that were not decided by the [Commission]?

For the reasons that follow, we answer "no" and affirm the judgment of the circuit court.

Facts

Evans was employed as an aquatic assistant with the City. As an aquatic assistant, Evans performed custodial work, including collecting trash and recycling, at the City's

Municipal Swim Center. Before the accident leading to this appeal, Evans had a history of chronic back pain: she had two surgeries on the lumbar area of her back in July 1999 and February 2002 to help alleviate her pain. Evans continued to have significant problems after her surgeries that required intermittent pain management of injections and medication. Evans's last pain management intervention before the accident at issue occurred in the Fall of 2008.

On January 5, 2009, as a part of her normal work duties, Evans took four trash bags that contained recycled paper to a tall dumpster. When Evans picked up the last bag and swung it to throw it into the dumpster, she testified that her back felt "like a twig, just something released, like it let go, popped in my lower back." After the incident, Evans experienced pain in her back and left leg. Because of her injury, Evans was unable to work, and the City paid her salary from January 6, 2009, to February 5, 2009.

On February 6, 2009, Evans filed for workers' compensation benefits with the Commission. On March 25, 2009, the Commission awarded Evans temporary total disability benefits and medical treatment benefits. The Commission issued subsequent orders authorizing additional temporary total disability benefits from January 6, 2009, to May 12, 2011, and from August 10, 2011, to August 22, 2012.

On May 9, 2013, Evans requested permanent total disability benefits claiming that her accidental injury and a pre-existing back condition resulted in permanent total disability. Evans impleaded the SIF, pursuant to Md. Code (1991, 2008 Repl. Vol.), § 9-807 of the Labor & Employment Article ("LE"), alleging that her permanent total

disability was substantially greater because of the combined effects of a previous back injury and her subsequent back injury of January 5, 2009.

At a hearing on August 7, 2013, the Commission considered whether Evans had a permanent total disability and whether SIF was required to pay any portion of the potential award. On September 4, 2013, the Commission issued an order finding that Evans was not permanently totally disabled but that she was entitled to temporary total disability. In particular, the Commission found that Evans's "disability" of 40 percent "loss of use of her body" was 20 percent "due to the alleged injury" and 20 percent "due to the previous permanent impairment."

Evans requested judicial review of the Commission's findings before a jury in the circuit court which began on June 2, 2014. At the start of the trial, but before the jury was impaneled, the court heard Evans's motion *in limine* to exclude the entire testimony of the expert witness, Dr. Stuart Gordon. Evans argued that Dr. Gordon's testimony was wrongly premised on the opinion that Evans did not suffer an injury on January 5, 2009, and his testimony should not be admitted. Both the City and the SIF argued that, while there was a disagreement about what permanent injury was caused by the January 5, 2009 accident, no one contested that Evans injured herself on January 5, 2009. The court denied Evans's motion. Because of the denial, Evans requested a curative instruction to the jury stating that whether Evans suffered an injury on January 5, 2009, was not in dispute but only the effects of that injury were in dispute. The court denied this motion as premature.

During the trial, Evans testified about the impact of the January 5, 2009 accident on her day-to-day life, and her ability to find future employment. On behalf of the City and

SIF, Dr. Gordon testified in a *de bene esse* deposition,[1] about Evans's injury and its effects. Thereafter, Evans objected to Dr. Gordon's entire testimony. After her objection was denied, Evans again requested a curative instruction about Dr. Gordon's testimony, which was also denied.

At the conclusion of trial, Evans objected to the "entire verdict sheet" with specific challenges to questions four, five, and six. As to question four, Evans argued that the verdict sheet did not contain "a specific request for a determination of the percentage of disability due to that pre-existing impairment because the way it's phrased now is asking for a percentage of impairment and not disability due to that impairment . . . [w]hich would be two separate questions." The circuit court denied Evans's objection, in part, allowing only the word "his" to be changed to "her" in question four. As to questions five and six, Evans argued that those questions were never reached by the Commission and could not be considered by the jury as a result. The court denied Evans's motion.

On June 4, 2014, as noted above, the jury returned a verdict finding that Evans "sustained a 20% total industrial loss of the body as a result of the occurrence of

[1] Md. Rule 2-419 states in pertinent part:

> (a)(4) *Videotape deposition of expert.* A videotape deposition of a treating or consulting physician or of any expert witness may be used for any purpose even though the witness is available to testify if the notice of that deposition specified that it was to be taken for use at trial.
>
> Maryland Rule 2-419 requires that a party should reasonably expect advance notice of an opposing party's intention to use a deposition at trial when the party desires to introduce a videotape deposition of an expert witness pursuant to Maryland Rule 2-412.

January 5, 2009," and that she "sustained a 20% impairment due to a previous accident or disease or congenital condition prior to her accidental injury[.]" Evans timely appealed.[2]

Additional information will be provided as necessary, below.

Discussion

I. Dr. Gordon's Expert Testimony

Evans first contends that Dr. Gordon's testimony was wrongly admitted and that, because it was, the circuit court should have ameliorated its impact by giving a curative instruction to the jury, or by allowing her to enter the Commission's prior orders into evidence to avoid any prejudice to her. The City and SIF argue that Dr. Gordon's testimony was "from a medical standpoint" and was "not offered as [a] . . . legal" opinion about whether an accident occurred on January 5, 2009. (Emphasis omitted). They cite the verdict sheet as evidence that Dr. Gordon's testimony "had no effect on the outcome of the case."

Through a *de bene esse* deposition, Dr. Gordon testified as an expert "in the field of medicine with an emphasis in orthopedic surgery" about his two medical evaluations of Evans. Evans first saw Dr. Gordon on March 12, 2009, for an independent medical evaluation. In the course of this evaluation, Dr. Gordon reviewed Evans's history and records, and he noted that she had significant back history prior to the January 5, 2009 incident which included two prior back surgeries in 1999 and 2002 and injections in 2005.

[2] After filing a motion for a new trial, Evans noted her appeal before the motion was ruled upon. The circuit court denied her motion allowing this appeal to proceed. On appeal, Evans does not challenge the denial of her motion.

He also saw her in July 2013 to update any treatment and give an opinion as to whether Evans's condition was permanent. Dr. Gordon testified that "the important thing to note [about Evans] is that this was not an individual who had no back history, in fact, she had a significant back history." When asked about a MRI of Evans's back from February 6, 2009, Dr. Gordon said "it shows multilevel or multiple levels of, of wear and tear, degenerative type changes." On direct examination, Dr. Gordon offered his expert opinion as follows:

> Q Do you have an opinion within a reasonable degree of medical probability as to whether the condition that is outlined on that report was caused by the work related injury in January of 2009?
>
> A Yes, I just want to make sure I understand your question. You are asking me if the February 6, 2009 MRI?
>
> Q Correct.
>
> A Okay. Is it related to the event, yes, I do have an opinion.
>
> Q And what is your opinion?
>
> A That it is not.
>
> Q Okay. What do you base that opinion upon?
>
> A Essentially, these are chronic changes. None of the treating doctors after this MRI felt that there was a specific anatomic abnormality related to this, to any findings on this MRI. She was never given a sort of recommendation based on this MRI report. So, I mean, she also, and also all of the pertinent abnormalities were at the levels she previously had surgery on twice. So, based on the fact of those considerations, I did not hold the opinion that these changes on the MRI were related to the injury, purported injury.
>
> * * *
>
> Q Now when you saw Ms. Evans in July of 2013 . . . [w]hat were the results of your examination of Ms. Evans on that day?

A I felt, my impression was that she had a preexisting history of chronic pain management. I felt that was all preexisting and unrelated. I continued to find no evidence of an event that occurred on that day of January 5th, 2009.

* * *

Q Now, let me switch gears a little bit, Doctor. You talked about impairment, permanent impairment being the reason for the July 2013 visit. What I'm going to do is ask you a question with a bunch of legal background to it. Based upon your review of the medical records, the history that you took from Ms. Evans, your physical examination of her, as well as your education, training, and experience. Do you have an opinion within a reasonable degree of medical probability as to what percentage of permanent impairment Ms. Evans has as a result of the work event of January 5, 2009?

A Yes.

Q Okay. What is your opinion?

A That it's zero percent.

Q What's the basis for that?

A Okay. Once again, I just wanted to explain that I do not hold the opinion that an event occurred.

[EVANS'S COUNSEL]: Objection. Move to strike.

THE WITNESS: The individual was having chronic problems, this is documented by her two surgeries. I have a report from 2005 where she's referred to pain management to avoid surgery by a neurosurgeon. The things that I recently mentioned with respect to she, she specifically told me herself that she'd just been in pain management a few months prior to this event. The fact that the pain management doctor documents in this first report that I have, that she'd recently been discharged from the other pain management facility.

And, and in addition to all that, the, you have to consider the magnitude of the injury. I mean, she told me that essentially what she was doing was just throwing out a light bag of paper, and she frequently told me that it wasn't heavy. So, you know, is, is this throwing out a bag of paper something that causes a permanent injury? In my opinion, I don't hold the opinion that, that an event actually occurred. My opinion with what's going on is just a continuation of her chronic pain.

BY [CITY'S COUNSEL]:

Q Did you come up with, let's take that in sections. Do you have an opinion as to whether or not Ms. Evans has a permanent impairment to her back irrespective of where it came from?

A Yes.

Q And what percentage do you believe she has?

A Ten percent.

Q And what percentage of that do you believe is related to the work related event of January 5, 2009?

A Zero percent.

Later, on recross examination, Evans asked for further clarification of Dr. Gordon's expert opinion:

Q I have one follow-up question, I'm sorry. Doctor, if you accepted that there was an injury at work on January 5th of 2009, would it then be appropriate to say that some portion of the permanent impairment that Ms. Evans has is due to that event?

[CITY'S COUNSEL]: Objection.

THE WITNESS: Okay. I just want to make sure I understand the question. You are saying if we theoretically accept that something occurred, would it be reasonable to attribute some portion of the 10 percent to that event the theoretical event?

BY [EVANS'S COUNSEL]:

Q Correct.

A Yes.

At the end of Dr. Gordon's testimony, Evans renewed her "motion to strike the entirety of Dr. Gordon's testimony." The circuit court denied her motion. At that time, Evans moved to enter into evidence the prior orders of the Commission "to rebut Dr.

Gordon's testimony[.]" Evans cited Dr. Gordon's testimony "that [Evans's injury] was simply a medical nonevent," and Dr. Gordon's reference to it as "a theoretical event." Evans underscored Dr. Gordon saying "several times that it's not his opinion that anything occurred on January 5th of 2009" as "contravention of the law of the case and our findings and the [Commission] and it goes to Dr. Gordon's credibility as an expert and what weight the jury should give his opinion."

After arguments, the circuit court ruled:

> I don't want the jury to labor over a legal decision versus a factual expert opinion with respect to the condition of her back. And claimant, excuse me, the [City] is precluded from arguing and they've always agreed from their opening statement into their closing, they are not going to make the argument that the Commission was wrong, or that there was no event. They are going to make an argument which they certainly can that whatever she was doing that day didn't worsen her condition and didn't cause her to have all the extra percentage injury that Barjuha says she has. You've got the battle of the experts. I don't want to take a side with the experts by admitting these documents that say hey, the Commission said that Dr. Gordon is wrong and I think that's exactly what I've been doing. You're not hamstrung in your arguments that Gordon's (unintelligible) behind all these years and this decision of the comp board, that independent (unintelligible) that's independent that just looks at it from both sides, theirs is a presumptively correct decision. So you have all that strength, but to add, to add and say hey look, the law is that Gordon's wrong, and I don't think Gordon's saying that.
>
> I think Gordon has the right, and the defense has the right to say, in other words, what you are saying is I'm supposed to tell the jury that Gordon's wrong and that he's not entitled to say, he's got to say something happened that day, and I don't think that's the law. In other words, I don't think because the Commission ruled that way, that the City of Rockville is precluded from saying, whatever she did, and he doesn't admit there was something going on. He said she was throwing up some light, or moving some light packages or something, and she's basically saying didn't exacerbate and cause any problems. So that's a long answer too, I'm going to deny that request.

Later, Evans's counsel would move to preclude any party:

> [F]rom arguing that Ms. Evans does not have any permanent impairment as a result of the January 5th, 2009 work injury. Because Dr. Gordon specifically said that if he accepted that that event occurred, then he would have to apportion some amount of the impairment to that work injury. I think it's disingenuous and it goes against to the idea that it's relitigating whether she got hurt at work.
>
> To even argue that she doesn't have any permanent impairment as a result of the work injury, there is no evidence that she didn't have any impairments as a result of her work injury. And as Dr. Gordon acknowledged, if he's going to accepted that it happened, then she has some impairment related to it . . . .
>
> THE COURT: I'm going to rule, deny the motion of the claimant. And let me say what I haven't said before. If the [Commission]'s decision was sacrosanct, it would be unappealable, it would be unassailable but it's a *de novo* hearing, it's a jury trial but you get that presumption, but it's a rebuttable presumption of correctness, and that's why we go through the evidence. I didn't make the law, but if the Court, the law in Maryland could be the only thing you are going to appeal from the workmans' comp decision would the Maryland Court of Special Appeals or on an error of law, but we don't have that.
>
> I'm not going to, I'm not going to restrict the evidence or the arguments based on the evidence that was presented in this case simply to try and protect the decision of the [Commission]. As I said, you have the rebuttable presumption, you can dress it up any way you want or argue it any way you want, but I'm going to allow both sides to argue what their, what was admitted in this case. So I'll deny that request.
>
> You folks can argue anything that any expert has said, and I don't find that, that simply because if something happened it would have, I don't agree with the claimant's argument with respect to Dr. Gordon because he's very clear in saying there was a 10 percent going in it, '09 incident, and it's still at 10 percent. The jury is free to reject that, they've got a couple of other percentages they can play with, with the other experts and so, will go for that.

Evans challenges the admissibility of Dr. Gordon's expert testimony about the impact of her January 5, 2009 injury. Evans does not dispute that Dr. Gordon was qualified

to testify but that, because he "bas[es] his opinions on the mistaken belief that Ms. Evans did not suffer an accidental injury, Dr. Gordon relies on pure conjecture and speculation, not evidence." Evans avers that Dr. Gordon "must accept that Ms. Evans suffered an injury at work that, at the very least, exacerbated a pre-existing condition[,]" because "[i]t is not his purview to offer testimony that the injury did not happen or that the incident did not worsen her condition[.]" Additionally, Evans argues that, because this testimony was erroneously admitted into evidence, the circuit court should have provided a curative instruction to the jury or have allowed Evans to rebut Dr. Gordon's testimony by introducing the previous orders of the Commission to avoid any prejudice.

Maryland Rule 5-702 governs the admission of expert testimony:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

We review a circuit court's decision to admit expert testimony for an abuse of discretion. *CSX Transp. Inc. v. Miller*, 159 Md. App. 123, 183 (2004). "[T]he admissibility of expert testimony is a matter largely within the discretion of the trial court and its action will seldom constitute a ground for reversal." *Radman v. Harold*, 279 Md. 167, 173 (1977) (citations omitted). Because Evans challenges Dr. Gordon's expert opinion as "predicated upon an invalid factual basis," we bypass the first two requirements of Md. Rule 5-702 and determine whether Dr. Gordon's testimony has a "sufficient factual basis . . . to support [his] expert testimony." We agree with the circuit court that it does. We explain.

Evans failed to present any evidence that Dr. Gordon's testimony was "speculation" or "conjecture" or that there was no sufficient basis for his expert testimony. Her only argument is that Dr. Gordon's testimony contravened the law of the case. Evans avers that "Dr. Gordon must accept that Ms. Evans suffered an injury at work that, at the very least, exacerbated a pre-existing condition . . . because it was . . . law of the case." Evans seeks to misapply this doctrine because the precise issue that Dr. Gordon testified to had not been considered by an appellate court.

We explained the law of the case doctrine in *Andrulonis v. Andrulonis*, 193 Md. App. 601, 614-15 (2010):

> The law of the case doctrine, specifically a subset of the doctrine known as the mandate rule, prevents trial courts from dismissing appellate judgment and re-litigating matters already resolved by the appellate court. Under that doctrine, a trial court is bound by the decision of an appellate court in the case before it . . . unless [the ruling is] changed or modified after reargument, and neither the questions decided nor the ones that could have been raised and decided are available to be raised in a subsequent appeal . . . . Thus, decisions rendered by a prior appellate panel [of the Court of Special Appeals] will generally govern the second appeal, unless (1) the previous decision [was] patently inconsistent with controlling principles announced by a higher court and is therefore clearly incorrect, and (2) following the previous decision would create manifest injustice.

(Internal citations and emphasis omitted).

Previously, the Commission's decision to grant Evans temporary total disability for her injury of January 5, 2009, was affirmed by the circuit court. *City of Rockville v. Evans*, 328902-V, slip op. (Cir. Ct. for Montgomery Cnty. Nov. 19, 2010). As a result, Evans suggests that Dr. Gordon's testimony should not have been admitted because he rejects "an established fact of [her] disability." But, there, the issues were different than what was

presented in the case presently on appeal which are Evans's permanent total disability and Evans's permanent impairment prior to her accident of January 5, 2009.

Dr. Gordon did not suggest that Evans was not at some point temporarily totally disabled — he questioned whether she had a permanent disability caused by this accident. Dr. Gordon agreed that Evans had a "[t]en percent" permanent impairment before January 5, 2009. Dr. Gordon's main thrust was that Evans was impaired, prior to her accident, testifying that she had chronic problems that were not "related to the injury[.]" Dr. Gordon repeatedly testified that she was "having chronic problems," and that the injury was "just a continuation of her chronic pain." He attributed "[z]ero percent" of Evans's permanent impairment to her injury of January 5, 2009, but, instead, attributed all of her permanent impairment to events prior to her accident. None of this amounts to a definitive statement that Evans was not in some way injured on January 5, 2009, only that she suffered no additional permanent impairment.

Evans also relies on *City of Frederick v. Shankle*, 136 Md. App. 339 (2001), for the proposition that an "expert witness can attempt to state there are other causes that lead to the disability, but cannot directly undercut an established fact of the disability." Evans argues that because Dr. Gordon could not "offer testimony that the injury did not happen or that the incident did not worsen her condition . . . [his] expert opinion is predicated upon an invalid factual basis [and] that testimony is merely conjecture or speculation." *Shankle* is inapplicable because it concerns the ability of an expert to testify that heart disease cannot be caused by occupational stress which contravened legislative code establishing a connection between the two. *Shankle*, 136 Md. App. at 365. As discussed, this appeal

concerned the extent of permanent disability, if any, that Evans suffered as a result of the accident on January 5, 2010.[3] *Shankle* offers no support for Evans's argument.

Because we cannot find an abuse of discretion by the circuit court in admitting Dr. Gordon's testimony, it follows that we cannot find abuse with the court's refusal to give a curative instruction or admit the Commission's order to show that Evans suffered an accidental injury.

As a last challenge on this issue, Evans cites a post-trial conversation with a juror that the juror was confused about whether an injury occurred as evidence of the need to ameliorate Dr. Gordon's testimony.

As we stated in *Dorsey v. State*, 185 Md. 82, 100-01 (2009), "[t]he well-settled Maryland rule is that jurors cannot be heard to impeach their verdict." (Citation omitted). Indeed, jurors' discussions are "sacrosanct." *John Crane, Inc. v. Puller*, 169 Md. App. 1, 53 (2006) ("In our system of justice, the jury is sacrosanct and its importance is unquestioned") (citation omitted). In *Stokes v. State*, 379 Md. 618, 638 (2004), the Court observed:

> Jury deliberations are private and are to be conducted in secret. The rule prohibiting verdict impeachment is stringent and of long standing; one reason for the rule is to protect the secrecy of jury deliberations. It has been said that while privacy is not a constitutional end in itself, it is the means of ensuring the integrity of the jury trial itself.

[3] We are mindful that Dr. Gordon's testimony, in large part, was based on an MRI performed 31 days after the accident which, in the opinion of Dr. Gordon, showed no abnormalities from the event of January 5, 2009. There was no assertion that Evans was not at one time temporary totally disabled because she was wholly disabled and unable to work because of an injury. LE § 9-618; *Buckler v. Willett Constr. Co.*, 345 Md. 350, 355 (1997) (citing R. Gilbert & R. Humphreys, *Maryland Workers' Compensation Handbook* § 9.2. at 203-04 (1993)).

(Internal citations omitted). *See also Clark v. United States*, 289 U.S. 1, 13 (1933) ("Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. The force of these considerations is not to be gainsaid.").

The attempt to introduce the post-verdict conversation with the juror "is a particularly gross example of soliciting a reconstruction of a juror's mental process in reaching the verdict." *Dorsey*, 185 at 108; Md. Rule 5-606(b)&(c).[4] A jury's statement that reveals an insight into the jury's deliberative thinking process, or at least the individual's deliberative thinking process, is not a proper subject for consideration. *Cooch v. S&D River Island, LLC*, 216 Md. App. 275, 302 (2014).

Not only is the type of evidence that Evans wishes to present prohibited, the jury verdict belies Evans's argument. Dr. Gordon testified that Evans's disability was 10 percent, of which 10 percent was due to a previous impairment, and zero percent was due to the incident of January 5, 2009. The jury did not accept Dr. Gordon's testimony and found Evans to be 40 percent disabled, of which 20 percent was due a previous impairment, and 20 percent was due to the January 5, 2009 accident. The jury's findings were not consistent with Dr. Gordon's testimony, and Evans was in no way prejudiced by his testimony.

[4] Maryland Rule 5-606(b) "codifies Maryland's strict common law juror non-impeachment rule." Lynn McLain, *Maryland Rules of Evidence*, at 110 (2007). It was adopted by the Court, effective July 1, 1994.

II. Jury Questions

Evans presents two issues with respect to the verdict sheet — (1) that question four was erroneously worded, and (2) that questions five and six were beyond the jurisdiction of the circuit court.

On its award of compensation, the Commission stated:

> Hearing was held in the above claim at Beltsville, Maryland on August 7, 2013 on the following issues:
>
> 1. Did the employee sustain an accidental injury arising out of and in the course of employment?
>
> 2. Is the disability of the employee the result of an accidental injury arising out of and in the course of employment?
>
> 3. What permanent impairment, if any, due to previous accident or disease or congenital condition did the employee have prior to his alleged accidental injury?
>
> 4. Was the previous permanent impairment a hindrance, or likely to become a hindrance, to the employee's employment?
>
> 5. Do the combined effects resulting from a previous permanent impairment, if any, and a subsequent accidental injury result in a permanent disability exceeding 50% of the body as a whole?
>
> 6. What proportion of the employee's alleged disability is due to the alleged injury and what proportion thereof, is due to the previous permanent impairment?
>
> 7. Is the employee's permanent disability substantially greater by reason of the combined effects of the previous permanent impairment and the subsequent injury than that which would have resulted from the subsequent injury alone?
>
> 8. What prior awards, if any, have been made to employee by this Commission, or a similar Commission in any other State

or the District of Columbia in determining the amount to be awarded for such subsequent injury?

9. How much of the claimant's disability is due to a subsequent accident or deterioration of a pre-existing condition? (Thomas)

10. If the claimant is permanently and totally disabled, is the permanent total disability from the accidental injury accident alone, even if claimant has some previous permanent impairment? (Compton)

ISSUES OF THE CLAIMANT:

1. PERMANENT TOTAL

THE COMMISSION FINDS ON THE ISSUES:

1. Withdrawn
2. Withdrawn
3. Low back
4. N/A
5. N/A
6. Under "Other Cases" amounting to 40% industrial loss of use of the body, 20% is reasonable attributable to the accidental injury (lower back) and 20% is due to pre-existing conditions (lower back).
7. N/A
8. N/A
9. NO
10. NO

1. NO

The Commission finds that the claimant was paid compensation for temporary total disability during the period beginning 1/6/09 – 5/12/11 and beginning 8/10/11 – 8/22/12 inclusive. The Commission further finds that the overall disability of the claimant does not exceed 50% of the body as a whole, and that the portion of the claimant's disability which is due to the accidental injury does not amount to 125 weeks of disability benefits. Therefore, the [SIF] is not liable at this time and the balance of the issues need not be answered. Average weekly wage - $843.73.

> It is, therefore, this 4th day of September, 2013, by the [Commission] ORDERED that the compensation for temporary total disability terminate on August 22, 2012 inclusive; and further ORDERED that the above-named employer and above-named insurer pay unto the above-named claimant, compensation for permanent partial disability at the rate of $302.00, payable weekly, beginning August 23, 2012, for a period of 100 weeks.
>
> The jury's verdict form stated, in pertinent part:
>
> 4. What permanent impairment, if any, due to a previous accident or disease or congenital condition did the employee have prior to her accidental injury?
>
> **ANSWER:** 20%
>
> 5. Was the previous permanent impairment a hindrance, or likely to become a hindrance, to the employee's employment?
>
> ✓ Yes __ No
>
> 6. Is the Claimant's permanent, industrial disability substantially greater by reason of the combined effects of the previous impairment and the accidental injury than which would have resulted from the accidental injury alone?
>
> ✓ Yes __ No

We do not agree with Evans's arguments attacking the verdict sheet for the reasons that follow.

Evans contends that the fourth question on the verdict sheet was erroneous because it did not resolve whether Evans had a pre-existing permanent partial disability. "As this determination is a question of law, we review the issue *de novo*." *Hurt v. Chavis*, 128 Md. App. 626, 631 (1999) (citing *Inlet Assocs. v. Harrison Inn*, 324 Md. 254, 264-66 (1991); *Maryland Nat'l v. Parkville Fed.*, 105 Md. App. 611, 614 (1995)).

Evans argues that jury question four "leaves this case in a procedural quagmire, as the question did not resolve the issue of Ms. Evans'[s] preexisting permanent partial

disability." In support of her argument, Evans cites the distinction between "impairment" and "disability," and she argues that finding "impairment . . . does not actually determine Ms. Evans'[s] preexisting disability." Evans requests that we remand the case so that the jury question can properly be changed to "[w]hat permanent disability, if any, due to a previous accident or disease or congenital condition did [Evans] have prior to her accidental injury?"

In response, SIF avers that because "an impairment plus a hindrance equals a disability[,] [t]he Commission implicitly found that she had a preexisting disability—rather than just an 'impairment'—by assigning a 20% industrial loss of the body to her preexisting condition, and the jury reached the same conclusion." According to SIF, the jury question "addressed the very question that Ms. Evans contends that it needed to address and did not err in deciding not to change the language of the relevant jury issue."

Evans impleaded SIF as a part of her permanent disability claim. When a person impleads SIF as a part of a workers' compensation case, it requires a determination of whether SIF must also compensate the person. LE § 9-802 governs such an action:

> (a) If a covered employee has a permanent impairment and suffers a subsequent accidental personal injury, occupational disease, or compensable hernia resulting in permanent partial or permanent total disability that is substantially greater due to the combined effects of the previous impairment and the subsequent compensable event than it would have been from the subsequent compensable event alone, the employer or its insurer is liable only for the compensation payable under this title for the subsequent accidental personal injury, occupational disease, or compensable hernia.
>
> (b) In addition to the compensation for which an employer or its insurer is liable, the covered employee is entitled to compensation from the Subsequent Injury Fund if:

> (1) the covered employee has a permanent impairment due to a previous accident, disease, or congenital condition that is or is likely to be a hindrance or obstacle to the employment of the covered employee;
> (2) the covered employee suffers a subsequent compensable accidental personal injury, occupational disease, or compensable hernia resulting in permanent partial or permanent total disability that is substantially greater due to the combined effects of the previous impairment and the subsequent compensable event than it would have been from the subsequent compensable event alone;
> (3) the combined effects of the previous impairment and the subsequent accidental personal injury, occupational disease, or compensable hernia result in a permanent disability exceeding 50% of the body as a whole; and
> (4) the previous impairment, as determined by the Commission at the time of the subsequent compensable event, and the subsequent accidental personal injury, occupational disease, or compensable hernia are each compensable for at least 125 weeks.
>
> (c) Compensation from the Subsequent Injury Fund shall be paid after the completion of payments of compensation by the employer or its insurer.

Jury question four modeled the language of LE § 9-802(b)(1). It read: "Was the previous permanent impairment a hindrance, or likely to become a hindrance, to the employee's employment?" Although Evans is correct that there is a difference between the words "impairment" and "disability" under LE § 9-802(b), the issue to be decided by the jury was whether the employee had an "impairment." Question four asked about Evans's "impairment" and, therefore, was not erroneous.

LE § 9-802(b) likewise governs questions five and six. Evans argues that questions five and six were beyond the circuit court's jurisdiction because they were not considered by the Commission. Both the City and SIF contend that questions five and six were "implicitly" considered by the Commission and, as a result, were properly before the jury.

Under LE § 9-802(b), each of the four enumerated conditions must be met for an award of compensation by SIF. The Commission found that Evans's injury did not exceed 50 percent of her body as a whole as required by LE § 9-802(b)(3). As a result, the Commission did not need to reach the issues numbered five and seven on their findings and numbered questions five and six on the verdict sheet because the four factors of LE § 9-802(b) are inclusive. The Commission reached the issues implicitly. Because questions five and six were properly submitted to the jury, we find no error.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.