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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS  
CHARLESTON, WEST VIRGINIA

21-0822

Department of Health & Human Resources, Employer,

Petitioner/Appellant,

v.

Appeal No. 2056601  
JCN: 2017017383  
CRN: 2240307660001

Deborah S. Smith, Claimant,

Respondent/Appellee.



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BRIEF ON BEHALF OF PETITIONER/APPELLANT  
West Virginia Department of Health & Human Resources

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**I. NATURE OF THE PROCEEDING**

Appellant (hereafter "Employer") appeals from the September 17, 2021 order of the Workers' Compensation Board of Review which affirmed the Office of Judges' Decision dated March 26, 2021. The Administrative Law Judge incorrectly reversed the claim administrator's order dated January 21, 2020 granting the claimant a 21% permanent partial disability (PPD) award, and instead, granted the claimant an additional 9% PPD award, for a total of 30% PPD. The appellant, West Virginia Department of Health and Human Resources, asserts that the order from the Board of Review is compromised by significant error insofar as it does not comply with W. Va. Code §23-5-12(b)(2005), W. Va. Code § 23-4-9b (1999), 85 C.S.R. 20-66.1, and Guides

to the Evaluation of Permanent Impairment,” (4<sup>th</sup> ed. 1993), as published by the American Medical Association.” 85 C.S.R. § 20-65.1. Therefore, this Honorable Court should reverse the September 17, 2021 order as it is clearly wrong.

## **II. STATEMENT OF THE CLAIM**

Claimant Deborah Smith was born March 5, 1965. Claimant sustained an injury on August 30, 2016 while entering her place of employment (W.Va. Department of Health and Human Resources) when she tripped over a rug and fell forward. Claimant first sought medical treatment at Williamson Memorial emergency room on January 10, 2017. The Employees’ and Physicians’ Report of Occupational Injury or Disease form was completed at that time and the ER physician did not recommend time off from work. The description of the injury was cervical strain and radiculopathy of the neck (C6-C7) and right arm and hand. Claimant had x-rays of the thoracic spine with no fracture, subluxation, or degenerative changes. A CT of the head was performed with stated it was normal. A CT report of the cervical spine was also completed, and the reported findings were that there was no acute abnormality but, there were some degenerative changes, particularly at C5-C6 level. Also, a thoracic spine CT was performed and that report stated there was no acute abnormality.

By order of January 30, 2017, the claim administrator approved claimant’s application for benefits on a no lost time basis for the work-related injury of August 30, 2016 and the accepted condition was Cervical Strain, ICD 10 Code: S134XXA.

On September 11, 2017, claimant had a cervical spine MRI completed. The report stated there were multilevel degenerative changes most prominent at the C5-C6 level with an incompletely evaluated syrinx<sup>1</sup> of the thoracic spinal cord. An MRI of the lumbar spine was completed that report stated there was multilevel degenerative disc disease. On October 17, 2017, claimant was referred for an IME with Dr. Bruce Guberman. Claimant was not found to be at MMI by Dr. Guberman.

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<sup>1</sup> Syringomyelia is the development of a fluid-filled cyst (syrinx) within the spinal cord. Over time, the cyst may enlarge, damaging the spinal cord and causing pain, weakness and stiffness, among other symptoms. Syringomyelia has several possible causes, though the majority of cases are associated with a condition in which brain tissue protrudes into the spinal canal (Chiari malformation). Other causes of syringomyelia include spinal cord tumors, spinal cord injuries... <https://www.mayoclinic.org/diseases-conditions>

On August 15, 2018, claimant was referred to Dr. Constantino Y. Amores for an Independent Medical Evaluation.

Claimant followed up with Williamson Medical Group. An MRI of the thoracic spine was done on November 18, 2018. That report stated there was an incidental finding of a syrinx that was incompletely characterized due to lack of use of contrast.

By order of September 5, 2018, the claim administrator denied the request from Dr. Francis dated July 13, 2019 for Psychology/behavioral medicine for depression with adjustment disorder.

By order of November 1, 2018, claimant's application for benefits regarding the August 30, 2016 claim was approved as compensable and the condition accepted was Bilateral Carpal Tunnel Syndrome.

On January 22, 2019, Dr. Francis requested authorization for Abilify 5mg daily to add on to her current therapy and Viibryd for anxiety/adjustment disorder.

Claimant had left carpal tunnel release on January 22, 2019 and then she had right carpal tunnel release on February 26, 2019 by releases performed by Dr. Luis Bolano.

On March 22, 2019 claimant had a cervical spine MRI completed, which revealed degenerative disc disease at C5-C6 consistent with the prior studies in that area. A thoracic MRI was completed which state the spinal cord syrinx was stable and there was noted to be degenerative changes.

On May 7, 2019, claimant was seen by Dr. Panos Ignatiadis, neurosurgeon with St. Mary's Neuroscience. Dr. Ignatiadis did not recommend surgery in this claim. Dr. Ignatiadis noted claimant had a syrinx, which was a congenital condition.

The July 18, 2019 order denied authorization for Dr. Francis' July 17, 2019 request for a second neurological consultation regarding claimant's complaints of lumbar radiculopathy.

On July 19, 2019, claimant was referred to Dr. Joseph E. Grady for an Independent Medical Evaluation. Dr. Grady's assessment of claimant was:

1. Cervical sprain super-imposed on pre-existing cervical degenerative changes.
2. Lumbosacral myofascial sprain super-imposed upon degenerative changes.
3. History of thoracic sprain with incidental finding of congenital syrinx.
4. Status post bilateral carpal tunnel release with some residual medical neuropathy.

Dr. Grady's findings were as follows:

The claimant is here for an Independent Medical Examination pertaining to the Workers' Compensation Claim from an incident

from 08/30/2016. On examination today, she has some slightly decreased range of motion of her neck as well as some decreased range of motion of the lower back area. Her thoracic range of motion is normal. She does report some persistent symptoms, particularly involving the cervical and lumbosacral areas. There are no signs of any current radiculopathy. The claimant had neurosurgical consultation, no surgery was recommended, but they did suggest physical therapy. It appears in the available record she has not actually had physical therapy apart from a course of chiropractic treatment that was done back in 2017. Based on the available information, I do believe that physical therapy would be reasonable for the back and neck injuries on this claim, particularly involving the cervical and lumbosacral areas where it seemed that she has majority of her symptoms. She is not at maximum medical improvement. As mentioned above, physical therapy for her neck and back would be appropriate and up to 10 sessions could be done for the involved areas of her spine. It would be my expectation she would be at maximum improvement upon completion of such treatment.

*(July 19, 2019, Independent Medical Evaluation Report by Dr. Joseph Grady)*

Claimant completed 10 physical therapy treatments for her neck and back at Tug Valley ARH Regional Medical Center from August 16, 2019 through August 30, 2019.

By letter dated September 5, 2019, Dr. Francis requested authorization for physical therapy for backpain/right leg weakness as recommended by the neurosurgeon.

By letter dated September 17, 2019, Dr. Francis requested authorization for Naproxen<sup>2</sup> 500mg bid to replace the Diclofenac and for Robaxin<sup>3</sup> 750mg to replace the Tizanidine. Dr. Francis states these are prescribed for inflammation and muscle relaxation.

By order of September 23, 2019, the claim administrator denied Dr. Francis' request for authorization of Naproxen 500mg and Robaxin 750mg. The denial was based on the findings of Dr. Grady in his July 19, 2019 IME report where it was stated that the claimant was not at MMI until after she received 10 physical therapy treatments for the neck or back. Claimant protested this order and the Office of Judges reversed the denial and ordered the drugs authorized.

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<sup>2</sup> MedicineNet lists naproxen 500 milligrams as a nonsteroidal anti-inflammatory drug (NSAID) used to treat pain, inflammation and fever as well as osteoarthritis, rheumatoid arthritis, ankylosing spondylitis and painful menstrual periods. The drug decreases users' levels of prostaglandins, chemicals responsible for pain, inflammation and fever. <https://www.reference.com/health/naproxen-500-mg-used-16521ff0530fa151>

<sup>3</sup> Robaxin (methocarbamol) is a muscle relaxant. It works by blocking nerve impulses (or pain sensations) that are sent to your brain. Robaxin is used together with rest and physical therapy to treat skeletal muscle conditions such as pain or injury...<https://www.drugs.com/robaxin.html>

On October 25, 2019, Dr. Grady provided an addendum to his prior IME report of July 19, 2019. After reviewing the medical records from Tug Valley ARH Regional Medical Center with physical therapy notes from 08/16/2019 through 08/30/2019, Dr. Grady acknowledged the fact that the claimant had received 10 sessions of physical therapy and therefore she had fulfilled recommendations with regards to West Virginia's Rule 20 Treatment Guidelines and the Official Disability Guidelines. Dr. Grady recommended claimant be examined for an impairment rating since he found her at maximum medical improvement.

By order of November 22, 2019, the claim administrator issue a denial to the request for the antidepressant, Trintellix. Claimant protested the order. The November 2, 2020 decision of the Administrative Law Judge reversed the denial and ordered Trintellix authorized.

By three separate orders each dated December 12, 2019, the claim administrator denied claimant's request to add conditions of cervical stenosis, herniated lumbar disc, severe depression as compensable as supported by the October 25, 2019, Addendum report by Dr. Joseph Grady, II. Claimant protested all three orders. The November 2, 2020 decision of the Administrative Law Judge affirmed the denial of the secondary diagnoses of cervical stenosis and herniated lumbar disc; and reversed the denial of severe depression as a compensable diagnosis.

Claimant was evaluated by Dr. Paul Bachwitt for an impairment rating on January 7, 2020 at the request of the claim administrator. Dr. Bachwitt determined claimant had reached her maximum medical improvement and saw no indication for maintenance treatment based on his January 7, 2020 claimant examination. The evaluator also provided his recommendations for whole person impairment as follows:

Under the Range of Motion model, in regards to the cervical spine, she would fall into Category 11-B, Table 75, page 113. This is a base rating of 4% whole person impairment in regards to additions by means of combined values for neurological deficits, she has none and the addition would be 0 percent. In regard to motion restriction, motion is restricted in the amount of 6%. The base rating of 4% combines with the motion restriction of 6% to equal 10% whole person impairment. Based upon the history and physical findings, the claimant is classified under the Cervical Category II of Table 85-20-E with the impairment rating ranging from 5 to 8% whole person impairment rating for that category. The range of motion impairment of 10% does not fall within the accepted ranges for this category. Therefore, the impairment has been adjusted to 8% pursuant to Rule 20, Section VII. I would apportion one half to the claimant's pre-existing degenerative changes, leaving

a total of 4% whole person impairment. Four percent whole person impairment is my total ROM cervical spine recommendation.

Under the Range of Motion model, in regards to the lumbar spine, she would fall into Category II-B, Table 75, page 113. This is a base rating of 5% whole person impairment. In regards to additions by means of combined values for neurological deficits, she has none and the addition would be 0 percent. In regard to motion restriction, the only motion restricted is forward flexion and it is restricted in the amount of 5%. The base rating of 5% combines with the motion restriction of 5% to equal 10% whole person impairment. Based upon the history and physical findings, the claimant is classified under the Lumbar Category II of Table 85-20-C with the impairment rating ranging from 5 to 8% whole person impairment rating for that category. The range of motion impairment of 10% does not fall within the accepted ranges for this category. Therefore, the impairment has been adjusted to 8% pursuant to Rule 20, Section VII. I would apportion one half to the claimant's pre-existing degenerative changes, leaving a total of 4% whole person impairment. Four percent whole person impairment is my total ROM lumbar spine recommendation.

Regarding the right carpal tunnel syndrome, using Table 11, Page 48 of the Guides, I calculate a sensory impairment of 25%. Using Table 12, page 49, I calculate no motor impairment. Per Table 15, page 54 of the Guides, median sensory loss would account for 38% upper extremity impairment. Twenty-five percent times 38 is 9.5% which rounds up to 10% upper extremity impairment and per Table 3, page 20 converts to a 6% whole person impairment.

Regarding the left carpal tunnel syndrome, using Table 11, page 48 of the Guides, I calculate a sensory impairment of 25%. Using Table 12, page 49, I calculate no motor impairment. Per Table 15, page 54 of the Guides, median sensory loss would account for 38% upper extremity impairment. Twenty-five percent times 38 is 9.5% which rounds up to 10% upper extremity impairment and per Table 3, page 20 converts to a 6% whole person impairment.

Under the Range of Motion model, in regards to the thoracic spine, she would fall into Category II-B, Table 75, page 113. This is a base rating of 2% whole person impairment. In regards to additions by means of combined values for neurological deficits, she has none and the additions would be 0 percent. In regard to motion restriction, motion is restricted in the amount of 1%. The base rating of 2% combines with the motion restriction of 1% to equal 3% whole person impairment. Based upon history and physical findings, the claimant is classified under Category II of Table 85-20-D with the impairment rating ranging from 5 to 8% whole person impairment rating for that category. The range of motion impairment does not fall within the accepted ranges for this category. Therefore, the

impairment has been adjusted to 5% pursuant to Rule 20, Section VII. I would apportion one half to the claimant's pre-existing degenerative changes, leaving a total of 2.5% which rounds to 3% whole person impairment.

*(January 8, 2020, IME by Dr. Paul Bachwitt)*

By order of January 21, 2020 claimant was granted a 21% permanent partial disability (PPD) award of 21%. Claimant protested the January 21, 2020 order.

Dr. Syam B. Stoll provided his July 15, 2020, medical opinion after his review of all medical records related to the August 30, 2016 compensable injury. Dr. Stoll agreed with Dr. Bachwitt's recommendation for whole person impairment and his percentage of apportionment related to claimant's cervical and lumbar spine injury of August 30, 2016.

In support of her protest, claimant submitted the June 22, 2020 report by Dr. Bruce Guberman. Dr. Guberman recommended claimant has an additional 9% whole person impairment over the 21% PPD already granted and objected to all apportionment for pre-existing degenerative changes.

The March 26, 2021, decision of the Administrative Law Judge reversed and increased the PPD by 9% based on the report and opinion of Dr. Guberman. The Workers' Compensation Board of Review affirmed the Office of Judges' Decision dated March 26, 2021.

### **III. ISSUE**

**WHETHER THE BOARD OF REVIEW INCORRECTLY AFFIRMED THE ORDER OF THE ADMINISTRATIVE LAW JUDGE WHICH WAS CLEARLY WRONG TO REVERSE THE JANUARY 21, 2020 ORDER GRANTING A 21% PPD AWARD AND GRANT A TOTAL OF 30% PPD AS THE ORDER DID NOT COMPLY WITH RELEVANT STATUTORY REQUIRMENTS REGARDING PPD AWARDS?**

### **IV. LEGAL AUTHORITIES AND CONCLUSIONS OF LAW**

W. Va. Code § 23-5-12(b)(2005).....pg. 1, 8, 11, 12, 13, 14

W. Va. Code §23-4-1g.....	pg. 8, 9, 12,
85 C.S.R. §20-65.1.....	pg. 2, 9, 10
W. Va. Code § 23-4-9b (1999).....	pg. 1, 10, 11, 13
85 C.S.R. §20-66.1 .....	pg. 10
85 C.S.R. §20-66.4 .....	pg. 10
85 C.S.R. §20.....	pg. 10

#### **IV. ARGUMENT**

##### **THE BOARD OF REVIEW INCORRECTLY AFFIRMED THE ORDER OF THE ADMINISTRATIVE LAW JUDGE WHICH WAS CLEARLY WRONG TO REVERSE THE JANUARY 21, 2020 ORDER GRANTING A 21% PPD AWARD AND GRANT A TOTAL OF 30% PPD AS IT FAILED TO COMPLY WITH RELEVANT STATUTORY REQUIRMENTS REGARDING PPD AWARDS.**

The Board of Review shall reverse a final order if the substantial rights of the petitioner have been prejudiced because the Administrative Law Judge's findings are (1) in violation of statutory provisions; (2) in excess of the statutory authority or jurisdiction of the Administrative Law Judge; (3) made upon unlawful procedures; (4) affected by other error of law; (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. W. Va. Code §23-5-12(b)(2005).

When the Office of Judges reviews the evidence of record and the facts of this claim it must weigh that evidence pursuant to the preponderance of the evidence standard as set forth in W. Va. Code §23-4-1g, which states:

(a) For all awards made on or after the effective date of the amendment and reenactment of this section during the year two thousand three, resolution of any issue raised in administering this

chapter shall be based on a weighing of all evidence pertaining to the issue and a finding that a preponderance of the evidence supports the chosen manner of resolution. The process of weighing evidence shall include, but not be limited to, an assessment of the relevance, credibility, materiality and reliability that the evidence possesses in the context of the issue presented. Under no circumstances will an issue be resolved by allowing certain evidence to be dispositive simply because it is reliable and is most favorable to a party's interests or position. If, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an equal amount of evidentiary weight exists favoring conflicting matters for resolution, the resolution that is most consistent with the claimant's position will be adopted.

(b) Except as provided in subsection (a) of this section, a claim for compensation filed pursuant to this chapter must be decided on its merit and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. No such principle may be used in the application of law to the facts of a case arising out of this chapter or in determining the constitutionality of this chapter.

W. Va. Code § 23-4-1g. (2005).

A permanent impairment rating is proper when it is concluded that the claimant has reached maximum medical improvement. Regarding permanent impairment, it must be remembered that permanent partial disability awards are granted to compensate injured workers for actual whole body medical impairment related to the compensable injury. The Office of the Insurance Commissioner, through the Industrial Council, has adopted regulations regarding evaluating claimants for permanent impairment. 85 C.S.R. §20-65.1 states that "...all evaluations, examinations, reports, and opinions with regard to the degree of permanent whole body medical impairment which an injured worker has suffered shall be conducted and composed in accordance with the "Guides to the Evaluation of Permanent Impairment," (4<sup>th</sup> ed. 1993), as published by the American Medical Association. " 85 C.S.R. § 20-65.1.

#### **Preexisting Impairments Not Considered in Fixing Amount of Compensation:**

Where an employee has a definitely ascertainable impairment resulting from an occupational or a nonoccupational injury, disease,

or any other cause, whether or not disabling, and such employee shall thereafter receive an injury in the course of and resulting from his employment . . . , such impairment, and the effect thereof, and an aggravation thereof, shall not be taken into consideration in fixing the amount of compensation allowed by reason of such injury, and such compensation shall be awarded only in the amount that would have been allowable had such employee not had such preexisting impairment. Nothing in this section shall be construed to require that the degree of such preexisting impairment be definitely ascertained or rated prior to the injury received in the course of and resulting from such employee's employment or that benefits must have been granted or paid for such preexisting impairment. The degree of such preexisting impairment may be established at any time by competent medical or other evidence. . . ."

W. Va. Code § 23-4-9b (1999).

The evidentiary weight to be given to a report will be determined by how well it demonstrates that the evaluation and examination that it memorializes were conducted in accordance with the Guides and that the opinion with regard to the degree of permanent whole body medical impairment suffered by a claimant was arrived at and composed in accordance with the requirements of the Guides. 85 C.S.R. 20-66.1.

To the extent that factors other than the compensable injury may be affecting the injured worker's whole body medical impairment, the opinion stated in the report must, to the extent medically possible, determine the contribution of those other impairments whether resulting from an occupational or a nonoccupational injury, disease, or any other cause. 85 C.S.R. § 20-66.4.

37.8. Modifiers (age, and co-morbidity). Co-morbidity (e.g., degenerative disc disease, spondylolisthesis, segmental instability, osteoporosis, spine deformity) may be associated with a higher incidence of persistent symptoms but are not compensable conditions. 85 CSR §20.

**The Administrative Law Judge's order failed to comply with W. Va. Code § 23-4-9b (1999); therefore, the Board of Review was required to reverse that order pursuant to W. Va. Code §23-5-12(b).**

W. Va. Code § 23-4-9b (1999) states that pre-existing impairment **shall not** be taken into consideration in fixing the amount of compensation allowed by reason of such injury, and such compensation shall be awarded only in the amount that would have been allowable had such employee not had such preexisting impairment. The weight of the credible and reliable evidence of record establishes that the January 21, 2020 which granted the claimant a 21% permanent partial disability award for the August 30, 2016 injury was clearly correct, consistent with the applicable statutes and regulations, and should have been affirmed. A careful review of the various medical reports of record shows that Dr. Bachwitt and Dr. Stoll both issued reports which are in complete accord with the *AMA Guides to the Evaluation of Permanent Impairment* and the West Virginia Workers' Compensation statute and regulations. Dr. Bachwitt's findings were based upon the results of objective medical testing obtained during his thorough physical examination. The claimant's impairment rating was based upon the valid test results and the expert analysis of the claimant's overall medical condition. Dr. Bachwitt and Dr. Stoll correctly considered the claimant's entire medical condition when assessing her impairment. They correctly considered her pre-existing conditions and how they should be addressed in terms of the impairment related to her compensable injury. The relevant statutory and case law requires that only impairment which is caused by and is related to the work related injury should be included in the workers' compensation rating.

Dr. Guberman, in an effort to inflate the percentage of impairment, included pre-existing impairment into his rating. The Administrative Law Judge incorrectly, in contravention of the statute, relied upon this erroneous report to increase the claimant's impairment. The Board of Review was required to reverse the March 26, 2021 order of the Administrative Law Judge pursuant to W. Va. Code § 23-5-12(b) because it was in violation of W. Va. Code § 23-4-9b

(1999) which requires that pre-existing impairment be factored out of any PPD award. The claimant cannot be awarded a percentage of impairment for conditions which were not caused by and are not related to her compensable injury. Because Dr. Guberman included non-occupational conditions in his rating, his opinion cannot serve as the basis for an award of permanent partial disability.

**The Administrative Law Judge's order failed to comply with W. Va. Code § 23-4-1g. (2005) which requires that its order be supported by a preponderance of the evidence ; therefore, the Board of Review was required to reverse that order pursuant to W. Va. Code §23-5-12(b).**

The opinion of Dr. Guberman is not valid because it contains pre-existing impairment. Moreover, it is not consistent with the preponderance of the reliable and credible evidence of record. His opinion stands alone in stating that the claimant has any impairment in excess of that granted by the award of January 21, 2020. The conclusions of Dr. Bachwitt and Dr. Stoll by contrast are consistent, reliable, credible and are in full accord with all applicable statutes and regulations. Both Dr. Bachwitt and Dr. Stoll correctly factored out the claimant's pre-existing impairment. Their reports constitute the preponderance of the relevant and credible evidence and by law must serve as the basis for an award of permanent partial disability in this matter. The Administrative Law Judge clearly erred in relying upon Dr. Guberman's report and the Board of Review was required to reverse that order pursuant to W. Va. Code §23-5-12(b).

**The administrative law judge clearly committed reversible error by substituting his own personal opinion regarding the degree of preexisting impairment instead of basing his opinion upon the reliable and credible medical opinions of record as he was required to do by statute. Therefore, the board of review was required to reverse the march 26, 2021 order.**

The Administrative Law Judge clearly committed reversible error when reversing the January 21, 2020 order. He impermissibly substituted his own personal opinion regarding the

degree of preexisting impairment instead of basing his opinion upon the reliable and credible medical opinions of record as he was required to do by statute. There is absolutely no evidence or finding that the opinions of Dr. Bachwitt and Dr. Stoll are neither reliable nor credible. The Administrative Law Judge simply disagreed with their expert opinions regarding the claimant's preexisting impairment. The Administrative Law Judge cannot substitute his non-expert opinion for that of the well-qualified expert physicians. By doing so, he committed clear error and the Board of Review was required to reverse the March 26, 2021 order pursuant to W. Va. Code §23-5-12(b)(2005).

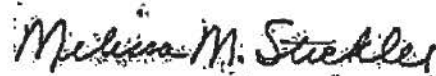
The Board of Review was required to reverse the March 26, 2021 order because it prejudiced the employer's substantial rights. The Administrative Law Judge's findings are (1) in violation of statutory provisions; which require preexisting impairment be deducted from impairment awards. W. Va. Code § 23-4-9b (1999). The statute specifically states that the degree of such preexisting impairment may be established at any time by competent medical or other evidence. . . ." *Id.* The statute does not permit the Administrative Law Judge to base the degree of preexisting impairment on his own non-expert opinions. Doing so is a clear violation of statute. The Administrative Law Judge does not have the statutory authority to render any decision in violation of statute; doing so is reversible error pursuant to W. Va. Code §23-5-12(b)(2005). The employer submits that in addition to this, the Administrative Law Judge's decision was clearly wrong in view of the reliable, probative and substantial evidence on the whole record and was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion pursuant to W. Va. Code §23-5-12(b)(2005). The clear preponderance of the reliable and credible evidence of record completely supports the January 21, 2020 order which granted the claimant a 21% permanent partial disability award. That order should have been affirmed by the

Administrative Law Judge. The March 26, 2021 order of the Administrative Law Judge was rife with reversible error, clearly prejudiced the employer's substantial rights and should have been reversed pursuant to W. Va. Code §23-5-12(b)(2005). Because the Board of Review's September 17, 2021 order which affirmed the March 26, 2021 order is legally and factually incorrect, this Honorable Court must reverse the same.

## VI. CONCLUSION

Based upon the foregoing, the employer submits that the Administrative Law Judge was clearly wrong to reverse the January 21, 2020 order granting the claimant a 21% PPD, and instead, grant an additional 9% PPD award for a total of 30% PPD since the 21% PPD award was supported by a preponderance of the reliable, objective evidence of record. Because the March 26, 2021 order violates the employer's substantial rights, the Board of Review was required to reverse the Office of Judges' March 26, 2021 Decision pursuant to W. Va. Code §23-5-12(b)(2005). Therefore, this Honorable Court should reverse the September 17, 2021 order and reinstate the January 21, 2020 order granting a 21% PPD award.

Respectfully submitted,  
Department of Health & Human Resources  
By Counsel



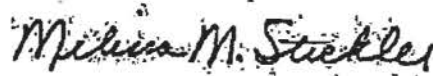
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Melissa Stickler WV Bar ID # 5792

## CERTIFICATE OF SERVICE

I, Melissa Stickler, attorney for the Department of Health & Human Resources, hereby certify that a true and exact copy of the foregoing "Brief on Behalf of Petitioner/Appellant, Department of Health & Human Resources" was served upon the Respondent/Appellee by forwarding a true and exact copy thereof in the United States mail, postage prepaid, this 12th day of October, 2021 addressed as follows:

Reginald D. Henry, Esquire  
Attorney at Law, PLLC  
P.O. Box 465  
Mabscott, WV 25871



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Melissa Stickler WV Bar ID # 5792

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APPENDIX B – REVISED RULES OF APPELLATE PROCEDURE

WORKERS' COMPENSATION APPEALS DOCKETING STATEMENT



Complete Case Title: Deborah Smith v. West Virginia Dept. of Health and Human Resources

Petitioner: West Virginia Dept. of Health and Human Resources Respondent: Deborah Smith

Counsel: Melissa Sticker

Counsel: Reginald Henry

Claim No.: 2017017383

Board of Review No.: 2058601

Date of Injury/Last Exposure: 08/30/16

Date Claim Filed: 01/10/17

Date and Ruling of the Office of Judges: 03/28/21

Date and Ruling of the Board of Review: 09/17/21

Issue and Relief requested on Appeal: Reversal of 9/17/21 Order of Board of Review

CLAIMANT INFORMATION

Claimant's Name: Deborah Smith

Nature of Injury: Cervical, thoracic, lumbar strain, carpal tunnel syndrome

Age: 56 Is the Claimant still working? ☐ Yes ☒ No. If yes, where: Unknown

Occupation: Child support technician No. of Years: Unknown

Was the claim found to be compensable? ☒ Yes ☐ No If yes, order date: 01/20/17

ADDITIONAL INFORMATION FOR PTD REQUESTS

Education (highest): Unknown Old Fund or New Fund (please circle one)

Date of Last Employment: Unknown

Total amount of prior PPD awards: Unknown (add dates of orders on separate page)

Finding of the PTD Review Board: Not applicable

List all compensable conditions under this claim number: Cervical, thoracic, lumbar strain, carpal tunnel syndrome  
(Attach a separate sheet if necessary)

Are there any related petitions currently pending or previously considered by the Supreme Court?

☐ Yes ☒ No

(If yes, cite the case name, docket number and the manner in which it is related on a separate sheet.)

Are there any related petitions currently pending below? ☐ Yes ☒ No

(If yes, cite the case name, tribunal and the manner in which it is related on a separate sheet.)

If an appealing party is a corporation an extra sheet must list the names of parent corporations and the name of any public company that owns ten percent or more of the corporation's stock. If this section is not applicable, please so indicate below.

☐ The corporation who is a party to this appeal does not have a parent corporation and no publicly held company owns ten percent or more of the corporation's stock.

Do you know of any reason why one or more of the Supreme Court Justices should be disqualified from this case? ☐ Yes ☒ No

If so, set forth the basis on an extra sheet. Providing the information required in this section does not relieve a party from the obligation to file a motion for disqualification in accordance with Rule 33.