

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID DUFF, II,

Petitioner,

v.

KANAWHA COUNTY COMMISSION,

Respondent.

Supreme Court No. 23-43  
Intermediate Court No.: 22-ICA-10  
JCN: 2021000317  
Claim No.: 2020015225  
DOI: 06/15/2020  
ICA Order: 01/10/2023

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BRIEF OF RESPONDENT KANAWHA COUNTY COMMISSION

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David Duff, II ("Petitioner" or "Claimant") petitions this Court for appeal of the December 9, 2022 signed opinion of the Intermediate Court of Appeals of West Virginia ("ICA"). In its order, the ICA affirmed the July 26, 2022, final order of the Workers' Compensation Board of Review ("BOR"), which affirmed the Claim Administrator's order dated June 17, 2021, which granted Claimant a 13% permanent partial disability ("PPD") award. Kanawha County Commission ("Respondent" or "Employer") files this brief in support of affirming the ICA's decision and denying Claimant's petition for appeal.

**I. STATEMENT OF THE CASE**

When he was injured on June 15, 2020, Claimant was a 47-year-old deputy sheriff for the Kanawha County Sheriff's department. (See Resp. Exhibit D, p. 72).

**A. Pre-Claim Medical Treatment**

Claimant has a history of back problems, and the Employer submitted medical evidence documenting a nineteen month history of chiropractic treatment on his lumbar spine. (See Resp. Exhibit A, pp. 1-68.) On September 26, 2018, he sought chiropractic treatment from Dr. Gabriel McKinney. Claimant reported having a lot of low back pain, stiffness in his legs, and difficulty with activities of daily living. (*Id.* at p. 4.) He filled out a Confidential Health History form indicating he first noticed symptoms when he started

working in 1999. (*Id.* at p. 1.) The case history notes he had low back pain/spams for the past 19 years. His diagnoses included segmental and somatic dysfunction of the lumbar region, and radiculopathy of the lumbar region, sacral and sacrococcygeal region. (*Id.* at p. 5.)

Claimant's chiropractic records reflect lumbar spine pain, soreness, tightness, swelling, and active trigger points from September 2019 through May 1, 2020. In fact, Claimant had low back complaints at his May 1, 2020 chiropractic visit, which was six weeks before the work incident at issue in this claim. (*Id.* at pp. 67-68.) At the May 1, 2020 visit, Claimant rated his pain as 6 out of 10. This rating applied to multiple levels of the spine, including lumbar, sacral, and left sacroiliac regions. Dr. McKinney notably stated Claimant's "current condition is further complicated by" various factors including degenerative disc disease. (*Id.* at p. 67.) Short term goals for ongoing treatment of Claimant's condition included improving Claimant's thoracolumbar range of motion ("ROM") by 50%, decreasing Claimant's pain and restoring Claimant's ROM, and achieving pain free activities of daily living. His diagnoses included "M99.03 Seg and somatic dysf of lumbar reg; M54.16: Radiculopathy, lumbar reg; M99.04 Seg and somatic dsyf of sacal reg; and M54.17: Radiculopathy, lumbosacral reg." (*Id.* at p. 68.)

#### **B. Post-Claim Medical Treatment**

On June 22, 2020, seven days after the alleged June 15, 2020 work incident, Claimant saw Dr. McKinney, reporting he hurt his back lifting a TV stand and was having intense lower back pain, left leg pain, and left gluteal pain and spams. (See Exhibit B, p. 69.) There was no mention of a June 15 work incident. The records again note complicating factors such as degenerative disc disease and a past history of prior

episodes. (*See id.*) He returned to Dr. McKinney the next day still limping, very sore and tight in his lower back, and tender in his left hip. (*See Exhibit C, p. 71.*) Again, there was no mention of a back injury from a June 15 work incident.

On June 23, 2020, Claimant saw Tina Beatty, MPAS, PA-C, complaining of left sided back pain and left leg pain. The record contains no mention of a June 15 work injury to the back. It was noted that Claimant wears a heavy gun belt, "but [there was] no known injury." (*See Exhibit D, p. 73.*) His assessment was lumbago with sciatica. (*See id., p. 75.*)

Claimant saw Dr. McKinney on July 1, 2020 complaining of intense lower back pain and left leg pain. For the first time since June 15, 2020, Claimant attributed the pain to lifting a piece of equipment out of the back of a truck for work during some training. Iceing was recommended, EMS was applied, and rehab exercises and stretching were prescribed. (*See Exhibit E, p. 77.*) He received chiropractic treatment. He returned on July 3, 2020 reporting no change. (*See Exhibit F, p. 79.*) On July 8, 2020, he complained of lower back pain, left leg pain, and spasms. (*See Exhibit G, p. 81.*)

Claimant's lumbar spine MRI taken on July 14, 2020, revealed mild disc desiccation at each individual lumbar levels, and a L3-L4 left foraminal/far left lateral disc protrusion causing moderate left neural foraminal narrowing. (*See Petitioner's Exhibit C, pp. 6-7.*)

On July 14, 2020, the Claim Administrator accepted the claim for diagnoses lumbar, left hip, pelvis, and sacrum strain. (*See Exhibit H, p. 83.*)

On July 15, 2020, Claimant reported to Dr. McKinney that he was having a lot of lower back pain and left leg pain and he could not drive, sit, or stand for any amount of time without pain. (*See Exhibit I, p. 84.*) On July 20, 2020, Claimant reported to Dr.

McKinney that the treatment was finally starting to help some. He was still having pain, spasms, and tightness, but he was able to drive and he was walking better. (See Exhibit J, p. 86.) On July 27, 2020 Claimant stated the decompression and treatment were helping a lot. (See Exhibit K, p. 88.) On July 31, 2020, Claimant reported a new symptom of intense burning from his left groin to his left knee. (See Exhibit L, p. 90.)

On August 5, 2020, Claimant saw Dr. Robert Crow for pain in his left hip/buttock area that radiates into the left thigh stopping at the left knee. (See Exhibit M, p. 93.) Dr. Crow reviewed the July 14, 2020 lumbar MRI films and report and found multilevel spondylitic changes throughout the lumbar spine and multiple disc degeneration. He noted a left-sided disc protrusion at L3-L4 which produces stenosis into the left neuroforamen and lateral recess. Bilateral neuroforaminal stenosis is seen to a mild to moderate degree at the L4-L5 level. (See *id.*, p. 94.) His impression was that Claimant was overweight and had intervertebral disc disorders with radiculopathy in the lumbar region and spinal stenosis of the lumbar region. (See *id.*, pp. 94-95.) Dr. Crow recommended a left L3 TF ESI and physical therapy. (See *id.*, p. 95.)

Claimant underwent left lumbar L3 TF ESI on August 19, 2020. (See Exhibit N, pp. 96-97.)

On September 16, 2020, Claimant followed-up with Dr. Crow reporting 10 days of very good pain relief after his ESI, but the pain returned and is quite severe. (See Exhibit O, p. 98.) He reported he was too uncomfortable to proceed with physical therapy. He wanted to undergo L3-4 PLIF (posterior lumbar interbody fusion). (See Exhibit O, p.100)

Claimant underwent L3-4 PLIF on November 3, 2020. (See Exhibit P, p. 102.) At his November 30, 2020 follow up with Dr. Crow, Claimant reported he was very happy



with the outcome of his surgery and he had complete resolution of his left leg pain. (See Exhibit Q, p. 106.) He reported some paresthesias over the anterior left thigh and some weakness in the left quad and knee on stepping. (See *id.*) Dr. Crow wanted Claimant to continue physical therapy. He was returned to work on light duty on November 30, 2020. Dr. Crow expected he would be able to return to work full duty in 3 months, if not sooner. (See *id.*, pp. 108-109.)

At Claimant's March 19, 2021, follow-up office visit with Dr. Crow, he reported complete resolution of his left leg pain, but some continued intermittent paresthesias over the anterior left thigh and also weakness in the left quad and knee on stepping. primary issue was mechanical instability of the left knee and knee buckling when going up or down steps or grade. (See Exhibit R, p. 110.) Dr. Crow believed it would be unsafe for Claimant to go back to work full duty as a sheriff's deputy. (See *id.*, p. 112.)

Dr. Mukkamala performed an independent medical examination ("IME") on June 9, 2021. (Petitioner's Exhibit D, pp. 8-26.) Claimant complained of occasional low back pain and left leg buckling/giving out due to weakness. Claimant returned to work at light duty after the L3-4 discectomy and fusion surgery and physical therapy after the operation. (See *id.*, p. 9.) Claimant's current symptoms were complaints of occasional low back pain and weakness in the left lower extremity. (See *id.*, p. 10.) Dr. Mukkamala found Claimant has reached maximum medical improvement ("MMI") and needs no further treatment other than continuation of a home exercise program. (See *id.*, p. 14.) He recommended Claimant continue modified duty for at least another 6 months and then his work capacity could be re-evaluated. (See *id.*, p. 15.) Using Figures 79 and 80 of the American Medical Association Guides to the Evaluation of Permanent Impairment, 4<sup>th</sup>

Edition, ("AMA Guides Fourth Edition"), Dr. Mukkamala rated 8% whole person impairment ("WPI") for lost range of motion ("ROM"). (See *id.*, pp. 15.) Because Claimant had lumbar fusion at one level and continues to have symptoms, he qualifies for 12% WPI under Table 75 on page 113, under item IVD. (See *id.*, pp. 15-16.) For the left quadriceps weakness, he rated 3% WPI. The combined ratings for the low back and lumbar spine totaled 21% WPI which was adjusted per Lumbar Category V of Table 85-20-C to 25% WPI. (See *id.*, p. 16.) Dr. Mukkamala opined the 25% WPI resulted from preexisting degenerative spondyloarthropathy as well as the compensable injury of June 15, 2020. He apportioned 12% WPI to the preexisting degenerative spondyloarthropathy and 13% WPI to the compensable injury. (See *id.*)

Claimant was awarded 13% PPD on June 17, 2021, (see Exhibit S, p. 113; Petitioner's Exhibit E, p. 27) and Claimant filed a protest.

On August 18, 2021, Claimant was examined by Dr. Crow reporting complete resolution of his left leg pain. He reported he had been stable over the last five months and he wanted to go back to work full duty as a deputy sheriff. (See Exhibit T p. 115.) Dr. Crow found that Claimant was stable, both radiographically and clinically over the last six to eight months, and he told Dr. Crow he would like to go back to work full duty as a deputy sheriff. (See *id.*, p. 116.)

Claimant into evidence a deposition transcript from Dr. Mukkamala concerning a different claim for a different claimant in 2016. (See Petitioner's Exhibit G.)

Claimant submitted the July 28, 2021, IME report from Dr. Bruce Guberman. (See Petitioner's Exhibit F, pp. 28-42.) Claimant reported to Dr. Guberman the surgery improved his symptoms significantly but he continues to have pain in his lower back

usually every day. (*See id.*, p. 29.) The pain does not radiate into the hips or legs. He reported numbness and tingling over the anterior aspect of both legs to the knees, and some intermittent left knee pain. Claimant also reported decreased sensation in the left leg below the knee and the bottoms of both feet as well as weakness and instability of his left leg. (*See id.*) He returned to work in December 2020 or January 2021 doing office work. He reported he now works security at the Judicial Annex and assists at the front door. (*See id.*, p. 30.)

Claimant reported he had occasional low back pain prior to this injury. (*See id.*) He had seen Dr. McKinney intermittently when he began working in the police department. However, Claimant told Dr. Guberman that before this injury, the pain had never radiated into his legs, and he had never had numbness, tingling or weakness in his legs. (*See id.*)

Dr. Guberman opined Claimant has reached MMI and needs no further treatment. (*See id.*, p. 32.) Using the AMA Guides Fourth Edition, Table 75, page 113, Dr. Guberman rated 12% WPI for the lumbar spine. He also rated 14% WPI for range of motion abnormalities of the lumbar spine. (*See id.*, pp. 32-33.) Additionally, he rated 1% WPI for sensory abnormalities of the lower extremities. (*See id.*, p. 33.) Dr. Guberman combined the 14% rating for ROM abnormalities with the 12% WPI from Table 75 on page 113 of the AMA Guides Fourth Edition by the Combined Values Chart to arrive at a total of 25% WPI. (*See id.*, p. 33.) Dr. Guberman assigned Claimant to Lumbar Spine Category V from Table 85-20-C with a range of impairment of 25% to 28%. (*See id.*)

With respect to apportionment, Dr. Guberman opined the entire impairment should be apportioned to the June 15, 2020, injury. (*See id.*) He further opined that although

Claimant had imaging studies that revealed evidence of degenerative joint and disc disease of the lumbar spine which was present before the injury, he would not have qualified for an impairment rating using either the ROM Model or Table 85-20-C before the current injury. Dr. Guberman stated Claimant's occasional lumbar spine pain did not radiate into his legs and he did not have numbness, tingling, or weakness in his legs due to the low back pain before the injury. Dr. Guberman opined Claimant's pre-injury low back pain was only intermittent and did not cause ongoing significant interference with his activities of daily living, functional limitations, or interference with work. Dr. Guberman does not believe there is an objective medical, logical rationale for determining any specific portion of the impairment to apportion for any preexisting conditions. (*See id.*)

Dr. Guberman apportioned his entire 25% WPI rating to this injury. Because Claimant has already received a 13% WPI rating, Dr. Guberman recommended he receive an additional 12% WPI for the injury. (*See id.*)

The Employer submitted a December 1, 2021 IME report from Dr. David Soulsby. (*See* Petitioner's Exhibit H, pp. 63-70.) Like Dr. Mukkamala, Dr. Soulsby found 25% WPI, but apportioned 12% to Claimant's preexisting disease process and 13% to the compensable injury. (*See id.*, pp. 68-69.) He noted Claimant had preexisting spondyloarthropathy in the lumbar spine, which the medical records reflect was symptomatic and required medical treatment. (*See id.*) Dr. Soulsby opined that, even if the preexisting process was not previously symptomatic, it is expected that degenerative disc disease will cause lost motion. (*See id.*, p. 69.) Therefore, because the preexisting process affects motion, it contributes to the observed impairment and apportionment is required. Citing the NCBI, Dr. Soulsby noted that the presence of degenerative disc

disease increases the probability that a disc herniation will occur. Dr. Soulsby opined that, not only does preexisting spondyloarthropathy contribute to Claimant's observed loss of motion, but it was also a contributor in causing the disc herniation itself. In fact, he noted there is a reasonable medical probability that Claimant's disc herniation would not have occurred in the absence of his spondyloarthropathy. (*See id.*, p. 70.)

By Order dated July 26, 2022, the Board of Review affirmed the June 17, 2021 order that granted Claimant a 13% PPD award. (*See* Petitioner's Exhibit I, pp. 71-79.) The BOR held that Claimant failed to establish by a preponderance of evidence that he sustained a greater impairment than the 13% found by Dr. Mukkamala. (*See id.*, p. 75.) The Board found Dr. Guberman's impairment estimate to be unreliable because he failed to apportion for impairment related to a preexisting low back condition that the BOR found was supported by records establish a preexisting back condition with a definite ascertainable functional impairment. (*See id.*, pp. 74-75.) Claimant appealed this order to the Intermediate Court of Appeals of West Virginia.

In its December 9, 2022, published decision, the unanimous ICA affirmed the July 26, 2022, order of the BOR, with Judge Scarr delivering the opinion of the Court. (*See* Petitioner's Exhibit J, pp. 80-114.) After examining the evidence of record before the BOR and the legal arguments of the parties, the ICA concluded that the BOR's decision in this case allowing a roughly equal apportionment of impairment between the compensable injury and Claimant's preexisting condition did not constitute legal error nor was it clearly wrong in view of the reliable, probative, and substantial evidence on the whole record. Accordingly, the ICA affirmed the decision of the BOR affirming the award of 13% PPD to Claimant as a result of his lifting injury. *See Duff v. Kanawha Cnty. Commission*, No.

22-ICA-10, 2022 WL 17546598, at \*10 (W.Va.App., December 9, 2022.)(See Petitioner's Exhibit J, p. 114.)

## **II. SUMMARY OF ARGUMENT**

The ICA was not clearly wrong in its decision affirming the 13% PPD award because the evidence of record supported its finding a roughly equal apportionment of impairment between the compensable injury and Claimant's preexisting condition is warranted. W.Va. Code § 23-4-6 and Rule 20 do not require that preexisting impairment be definitely ascertained using the Range of Motion Model of the AMA Guides Fourth Edition.

## **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Employer submits that the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

## **IV. ARGUMENT**

### **A. Standard of Review**

Pursuant to W. Va. Code § 51-11-10(c), the Supreme Court of Appeals has discretion to grant or deny the petition for appeal or certiorari of a decision by the Intermediate Court of Appeals. *See also*, W. Va. Code § 58-5-1(b) ("As provided in § 51-11-10 of this code, a party in interest may petition the Supreme Court of Appeals for appeal of a final order or judgment of the Intermediate Court of Appeals in accordance with rules promulgated by the Supreme Court of Appeals.") In this case, the ICA issued its decision ruling on the Board of Review's July 26, 2022 order in accordance with W. Va. Code § 23-5-8b(d)(2): "The West Virginia Intermediate Court of Appeals, created in § 51-11-1 et seq. of this code, has exclusive appellate jurisdiction over . . . [a]ll final

orders or decisions issued by the Workers' Compensation Board of Review after June 30, 2022."

An appeal from the Intermediate Court of Appeals to the West Virginia Supreme Court of Appeals should be guided by W. Va. Code § 23-5-15(b)<sup>1</sup> which provides that "[i]n reviewing a decision of the [ICA], the supreme court of appeals shall consider the record provided by the [ICA] and give deference to the [ICA's] findings, reasoning and conclusions[.]" *Williby v. West Virginia Office Ins. Comm'r, et al.*, 224 W. Va. 358, 361, 686 S.E.2d 9, 11 (2009).

W. Va. Code § 23-5-15(d) is applicable to the Court's review the ICA's decision:

If the decision of the [ICA] represents an affirmation of a prior ruling by both the commission and the Office of Judges that was entered on the same issue in the same claim, the decision of the board may be reversed or modified by the Supreme Court of Appeals only if the decision is in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. The court may not conduct a de novo reweighing of the evidentiary record.

The Court declared its standard of reviewing Board of Review decisions that is applicable in this case in its review of the ICA decision:

When reviewing a decision of the West Virginia Workers' Compensation Board of Review ('the Board'), this Court will give deference to the Board's findings of fact and will review de novo its legal conclusions. The decision of the Board may

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<sup>1</sup> The Legislature created the Intermediate Court of Appeals in the West Virginia Appellate Reorganization Act of 2021, W. Va. Code § 51-1-1. et seq. Several provisions of Chapter 23 were amended as a result of the new court and the transfer of duties and jurisdiction to the Board of Review from the Workers' Compensation Office of Judges. See W. Va. Code § 23-5-8b(b). While it appears the Legislature failed to revise the language W. Va. Code § 23-5-15. Respondent agrees with Petitioner that the standard of review in this case from ICA's December 9, 2022 decision affirming the BOR's July 26, 2022 order is set forth in W. Va. Code §§ 23-5-15(b) and (d). *Contra* W.Va. Code § 23-5-15(a) ("As provided in [W. Va. Code § 23-5-8b], the provisions of this section do not apply to any decision issued by the Workers' Compensation Board of Review after June 30, 2022."

be reversed or modified only if it (1) is in clear violation of a constitutional or statutory provision; (2) is clearly the result of erroneous conclusions of law; or (3) is based upon material findings of fact that are clearly wrong.

Syllabus point 1, *Moran v. Rosciti Construction Co., LLC*, 240 W. Va. 692, 815 S.E.2d. 503 (2018).

**B. The ICA was not clearly wrong in finding that a roughly equal apportionment of impairment between the compensable injury and Claimant's preexisting condition is warranted and that Claimant is therefore entitled to no more than the 13% PPD granted by the Claim Administrator.**

A claimant in a workers' compensation proceeding has the burden of proving his claim. See e.g., Syl. pt. 2, *Clark v. State Workmen's Compensation Com'r*, 155 W. Va. 726, 187 S.E.2d 213, 214 (1972); Syl. pt. 1, *Staubs v. S.W.C.C.*, 153 W. Va. 337, 168 S.E.2d 730 (1969). "Pursuant to W.Va. Code § 23-4-1g(a) (2003) (Repl. Vol. 2010), a claimant in a workers' compensation case must prove his or her claim for benefits by a preponderance of the evidence." Syl. pt. 1, *Arch Coal, Inc. v. Jimmie Lemon*, 240 W.Va. 650, \_\_\_, 814 S.E.2d 667, 668 (2018)(quoting Syl. pt. 2, *Gill v. City of Charleston*, 236 W.Va. 737, 783 S.E.2d 857 (2016)).

Pursuant to W. Va. Code § 23-4-6(i), the degree of permanent partial disability "shall be determined exclusively by the degree of whole body medical impairment" a claimant has sustained, which is to be evaluated in accordance with standards adopted by the Insurance Commissioner. Such standards are found at W. Va. C.S.R. § 85-20-64, et seq. 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 AMA Guides Fourth Edition. W.Va. C.S.R. §85-20-65.1. 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 applicable Guides and that the opinion with regard to the degree of permanent whole body medical impairment suffered by an injured worker was arrived at and composed in accordance with the requirements of the applicable Guides. W.Va. C.S.R. §85-20-66.1.

In evaluating a disability of a claimant, it is the Board of Review member's duty to examine the physical findings of the examining physicians and determine from that and all other evidence in the case what award, if any, the claimant should be granted. See *McGeary v. State Workmen's Compensation Director*, 148 W. Va. 436, 135 S.E.2d 345 (1964); *Haines v. Workmen's Compensation Commissioner*, 151 W. Va. 152, 150 S.E.2d 883 (1966); *Stewart v. State Workmen's Compensation Commissioner*, 155 W. Va. 633, 186 S.E.2d 700 (1972).

Claimant's argument that the ICA committed reversible error in affirming the Board of Review's order to apply a roughly equal apportionment of impairment between the compensable injury and Claimant's preexisting condition is inconsistent with the facts of the case and a proper application of determining preexisting impairment set forth in W. Va. Code § 23-4-9b. W. Va. Code § 23-4-9b and the regulatory guidelines for examining physicians set forth in Rule 20 require that whole person impairment be calculated using the ROM Model from the AMA Guides Fourth Edition. See W. Va. C.S.R. § 85-20-64, et seq.

Claimant argues that apportionment of a permanent partial disability rating is permitted only when alleged preexisting impairment is definitely ascertained by independently calculating that impairment using the Range of Motion Model from the AMA

Guides Fourth Edition. In essence, he argues preexisting impairment can be calculated *only* with ROM test data performed prior to the injury of June 15, 2020. W. Va. C.S.R. §85-20-65.1 *et seq.* does provide for use of the ROM Model of the AMA Guides Fourth Edition in the conduct of an examination aimed at determining a claimant's current level of impairment. As a practical consideration, recording of ROM measurements is not routinely practiced by physicians outside the context of an independent medical examination. Consequently, ROM data taken under the criteria of the Guides' ROM Model is typically not available outside the independent medical examination context. Nevertheless, examiners are mandated to determine the nature and extent of any factors other than the compensable injury that may be affecting a claimant's impairment. W. Va. C.S.R. §85-20-66.4. A claimant's medical history, as established by historical medical records, is obviously a crucial factor in making such determinations. Importantly, preexisting impairment "may be established at any time by competent medical or other evidence," pursuant to W. Va. Code § 23-4-9b. Moreover, W. Va. C.S.R. §85-20-65.1 permits a provider to rate impairment in the event the Guides "cannot be appropriately applied." In that event, the examiner is required to "explain the basis for that opinion."

The ICA was not clearly wrong in affirming the BOR decision in which the Board found Dr. Guberman's report was incomplete because Dr. Guberman eschewed apportionment in an instance when apportionment was quite appropriate in light of medical evidence documenting Claimant's condition prior to the compensable injury. In this regard, Dr. Mukkamala's report "was most consistent with the evidentiary record," and his apportionment calculation was credible.

The ICA made three key findings in its decision. First, the Intermediate Court found:

1. “Definitely ascertainable” and “definitely ascertained” for purposes of our workers’ compensation statute, West Virginia Code § 23-4-9b (2003), refer to the existence of a preexisting condition, and not to the precise degree of impairment to be apportioned.

*Duff*, 2022 WL 17546598 at \*1.

The Intermediate Court noted that W. Va. Code § 23-4-9b provides that the amount of a preexisting impairment “may be established at any time by competent medical or other evidence,” and that such impairment need not have been “definitely ascertained or rated prior to” the current compensable injury. *Duff*, 2022 WL 17546598 at \*5 (citing W. Va. Code § 23-4-9b). Examining the Rule 20 guidelines for rating permanent impairment, the Intermediate Court noted that examiners are permitted to deviate from the requirements of the AMA Guides Fourth Edition, thus making it “clear that it is not necessary to fully comply with the Guides in all circumstances.” *Id.* Rule 20, the Intermediate Court noted, further contains a mandate that examiners “must, to the extent medically possible, determine the contribution” of other impairments. *Id.*, at \*6 (citing W.Va. C.S.R. § 85-20-66.4). Consequently, in order for apportionment to occur, there need not be pre-injury medical documentation only of the type contemplated by Petitioner’s theory for a precise formulation of pre-injury impairment. As the Court found in *Duff*, “We conclude that “definitely ascertainable” and “definitely ascertained” refer to the existence of a preexisting condition, and not to the precise degree of impairment to be apportioned.” *Duff*, 2022 WL 17546598, at \*5.

The Intermediate Court’s second and third findings in *Duff* invalidate Petitioner’s contention that impairment predating the compensable injury “can be definitely

ascertained only with range of motion test data performed prior to the December 12, 2019 injury.” (See Pet. Br. p. 10.)

2. Quantifiable information, such as pre-injury range of motion measurements, prior permanent partial disability awards, or pre-injury conditions or procedures that would yield a percentage of impairment from a Table, is not always required to apportion impairment, as long as there is a reasonable basis for apportionment based on other competent evidence.
3. Whether preexisting degenerative changes of the spine would qualify for an impairment rating using either the Range of Motion Model or West Virginia Code of State Rules Tables 85-20-C, D or E is not the standard for whether those changes can be ascertained and then apportioned.

*Duff*, 2022 WL 17546598 at \*1.

The Intermediate Court noted the lack of any “binding authority in West Virginia to support the contention that apportionment for preexisting conditions always requires preinjury range of motion data, which is often, if not usually, unavailable.” *Duff*, 2022 WL 17546598 at \*7. The Intermediate Court determined that the Range of Motion (“ROM”) Model “is not the only way of estimating impairment for purposes of apportionment.” *Duff*, 2022 WL 17546598 at \*6. Indeed, limiting examiners to such methodology in every case “would be contrary to the directive” in W. Va. Code § 23-4-9b which holds that prior injuries “shall not be taken into consideration in fixing the amount of compensation allowed by reason of the subsequent injury.” *Id.* (citing W. Va. C.S.R. § 85-20-66.4). The Intermediate Court reiterated that the degree of preexisting impairment as a matter of law “. . . may be established at any time by competent medical or other evidence.” *Id.* (quoting W. Va. Code § 23-4-9b).

The ICA was not clearly wrong in determining apportionment was proper because the July 14, 2020 lumbar MRI imaging documented preexisting degenerative changes (see Petitioner’s Exhibit C. pp. 6-7), and treatment records indicated that pain was

affecting Claimant's motion and ability to perform activities of daily living. As noted by the ICA, the evidentiary record of Dr. McKinney's chiropractic treatment for nineteen months starting in September 2019 document spine pain, soreness, tightness, swelling, and active trigger points from September 2019 through May 1, 2020. (See Respondent Exhibit A, pp. 1-68.)

The overwhelming competent medical evidence of record demonstrates the Claim Administrator properly awarded 13% PPD based on Dr. Mukkamala's Guides-based impairment rating and credible apportionment opinion, which was supported by Dr. McKinney's medical records and Dr. Soulsby's report. Dr. Guberman's lack of any apportionment of impairment to preexisting degenerative conditions renders his opinion invalid. The medical records show that Claimant has had lumbar spine problems for many years and he first noticed symptoms when he started working in 1999. (See Resp. Exhibit A, p. 1.) He also reported to his chiropractor in 2018 that he had low back pain/spasms for the past nineteen years. (See *id.*, p. 4.) Claimant has been receiving chiropractic treatment for his lumbar spine since September 26, 2018, almost two years prior to the work injury at issue in this claim. The last chiropractic visit prior to the work injury clearly shows that Claimant had restricted ROM and significant spinal pain (level 6 out of 10) which adversely affected his activities of daily living. (See *id.*, pp. 67-68.) This treatment was active and ongoing immediately prior to the work incident in this claim.

This longstanding and ongoing chronic condition was such that medical records immediately after the June 15, 2020, work injury indicate Claimant did not consider himself to have sustained a new injury at all, let alone a significant one that changed his medical status. Dr. Crow, the neurosurgeon, stated the MRI showed multilevel spondylitic

changes throughout the lumbar spine and multiple disc degeneration in addition to the disc protrusion at L3-L4. (See Resp. Exhibit M, p. 93-95.) He opined that Claimant was overweight and had intervertebral disc disorders with radiculopathy in the lumbar region and spinal stenosis of the lumbar region. (See *id.*) Recall that Dr. McKinney's pre-injury notes repeatedly reference radiculopathy and describe Claimant's degenerative disc disease as a complicating factor. Dr. Guberman's report reflects that he did not review any of these pre-injury medical records, thereby damaging the credibility and reliability of his opinion.

Claimant cites the Memorandum Decision in *Scott v. Welded Construction, LP*, No. 19-1164 as supportive of apportionment, and argues that classification in Category V based on a fusion entitles Claimant to a 25% award based on the fusion alone, irrespective of his ROM loss. However, in *Scott*, an apportionment of 10% was affirmed based on a prior 10% award for an injury at a different lumbar level than that where the fusion occurred. Thus, based on the *Scott* opinion, the ICA properly determined in this claim that the lumbar spine is to be assessed in its entirety and that apportionment is to occur when appropriate.

In *Epling v. Chancellor Health Partners, Inc.*, 2022 WL 855689, at \*3, No. 20-0941 (W.Va. Supreme Court March 23, 2022), the Court found that a preponderance of the evidence indicates that Ms. Epling's impairment rating should be apportioned for her preexisting lumbar spine conditions. Ms. Epling's preinjury imaging and treatment records support Dr. Mukkamaia's apportionment and impairment rating. Dr. Guberman's report was unreliable because he failed to apportion for the preexisting lumbar spine conditions.

Similarly in this case, the evidentiary record indicates Claimant had a long history of lumbar treatment prior to the date of injury, including chiropractic manipulations to Claimant's spine, and Claimant was diagnosed with lumbar radiculopathy. Claimant's preexisting medical condition was complicated by degenerative disc disease and the treatment goals for his chiropractor were to decrease pain and restore range of motion. The ICA was not clearly wrong to find Dr. McKinney's medical records are competent medical evidence substantiating Dr. Mukkamala's medical opinion of apportionment of preexisting impairment.

#### **V. CONCLUSION**

Claimant has failed to show that the ICA's decision was in clear violation of constitutional or statutory provision, is clearly the result of erroneous conclusions of law, or is based upon the board's material misstatement or mischaracterization of particular components of the evidentiary record. For all the foregoing reasons, the Respondent respectfully requests this Court affirm the December 9, 2022 decision of the Intermediate Court of Appeals that affirmed the July 26, 2022 Board of Review decision that affirmed the Claim Administrator's June 17, 2021 order granting Claimant a 13% PPD award.

**KANAWHA COUNTY COMMISSION**

By: SPILMAN THOMAS & BATTLE, PLLC



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DAVID DUFF, II,

Petitioner,

v.

KANAWHA COUNTY COMMISSION,

Respondent.

Supreme Court No. 23-43  
Intermediate Court No.: 22-ICA-10  
JCN: 2021000317  
Claim No.: 2020015225  
DOI: 06/15/2020  
ICA Order: 01/10/2023

CERTIFICATE OF SERVICE

I, H. Dill Battle III, do hereby certify that the foregoing "**BRIEF OF RESPONDENT KANAWHA COUNTY COMMISSION**" has been served upon all parties by File & Serve Xpress e-filing on this 21<sup>st</sup> day of February 2023 as follows:

William B. Gerwig, III, Esquire  
P. O. Box 3027  
Charleston, WV 25331



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W. Va. State Bar ID #6295