

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

CCBCC, INC.,

Petitioner,

and

Case No.:

JCN: 2020024017

CCN: 002152021789-WC-01

DOI: 04-10-2020

ERICK S. BOLES,

Respondent.

**BRIEF OF PETITIONER
CCBCC, INC.**

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CCBCC, INC.**

ASSIGNMENT OF ERROR

This workers' compensation claim is in litigation pursuant to the Respondent's/Claimant's protest to the claim administrator's order of February 3, 2022, which granted the claimant a 3% permanent partial disability award. By order dated May 16, 2023, the Workers' Compensation Board of Review reversed the claim administrator's order and granted the claimant an additional 5% permanent partial disability award (total award of 8%).

The Petitioner alleges that the Workers' Compensation Board of Review erred in increasing the permanent partial disability award because the increased award is based upon a medical opinion that fails to account for the claimant's pre-existing, age-related degeneration of the cervical spine. Such an award violates W. VA. CODE § 23-4-9b. The claim administrator's order, therefore, should be reinstated.

STATEMENT OF THE CASE

The claimant is a 57-year old account merchandiser for the employer. On April 27, 2020, the claimant sought treatment from Jay McClanahan, DC, for pain in his neck, shoulder, and arm. The claimant reported that this pain had been ongoing for 15 days. The claimant sought treatment from Chiropractor McClanahan again on April 30, May 4, and May 7. The clinical notes associated with these visits did not report any occupational injury.

On May 13, 2020, the claimant reported to the C.O.M.P.A.S.S. occupational medicine clinic. At that time, he reported that he had injured his neck while lifting a case of drinks at work on April 10, 2020. The claimant completed a report of occupational injury at that time.

On the same day, the employer completed its report of injury. The employer reported that it was not informed of the alleged injury of April 10, 2020, until May 13, 2020.

By order dated May 22, 2020, the claim administrator denied the claimant's application for benefits on the basis that the claimant's medical records did not support the occurrence of an occupational injury on April 10, 2020, and that the claim was not timely reported as required by W. VA. C.S.R. § 85-1-3. The claimant protested this order, and the Office of Judges ultimately ruled this claim to be compensable for a cervical sprain.

The claimant subsequently attended a medical evaluation with Dr. Prasadarao Mukkamala on January 6, 2022. Dr. Mukkamala is board-certified in physical medicine and rehabilitation. Dr. Mukkamala reviewed the claimant's medical records, interviewed the claimant, and conducted a physical examination of the claimant. Based upon this evaluation procedure, Dr. Mukkamala concluded that the claimant had achieved maximum medical improvement with regard to the compensable injury. Dr. Mukkamala recommended that 3% whole person impairment be assigned to the compensable claim.

By order dated February 3, 2022, the claim administrator granted the claimant a 3% permanent partial disability award commensurate with Dr. Mukkamala's findings. The claimant protested this order.

In support of his protest, the claimant offered a medical evaluation report from Dr. Bruce A. Guberman. Dr. Guberman recommended that 8% whole person impairment should be assigned to this claim, as he elected to make no apportionment for the claimant's degenerative changes.

The employer then referred the claimant to Dr. David L. Soulsby for evaluation. Dr. Soulsby is board-certified in orthopedic surgery. Dr. Soulsby reviewed the claimant's medical records, interviewed the claimant, and conducted a physical examination of the claimant. He also reviewed the findings of Dr. Mukkamala and Dr. Guberman. Dr. Soulsby noted that the claimant's range of motion had worsened over the course of the three examinations despite the lack of any new injury. He characterized the claimant's arthritic condition and stenosis as severe. Dr. Soulsby opined that most, if not all, of the claimant's range of motion limitations are related to degenerative conditions, not a simple sprain/strain injury. He recommended that three-quarters of the claimant's impairment be assigned to degeneration and one-quarter to the acute injury. Dr. Soulsby recommended that 2% whole person impairment be attributed to the compensable injury.

By decision dated May 16, 2023, the Workers' Compensation Board of Review reversed the claim administrator's order and increased the claimant's permanent partial disability award by 5% (a total award of 8%). The underlying order fails to properly account for age-related degeneration of the claimant's cervical spine that was identified in multiple medical reports. The Petitioner, therefore, respectfully requests that the claim administrator's order be reinstated.

SUMMARY OF ARGUMENT

The claimant underwent evaluation with three separate physicians. All three physicians concurred that the claimant's cervical spine showed signs of age-related degeneration. Two of the physicians apportioned their impairment ratings for that age related degeneration, as required by W. VA. CODE § 23-4-9b. The Workers' Compensation Board of review adopted the findings of the one physician who did not apportion any of the claimant's impairment rating despite finding that age-related degeneration was present. The Petitioner believes this action to be in error.

STATEMENT REGARDING ORAL ARGUMENT

The Petitioner, CCBCC, Inc., does not believe that oral argument would enhance the Intermediate Court of Appeals' understanding of the issues presented in this appeal.

ARGUMENT

The Workers' Compensation Board of Review committed reversible error in the underlying decision. Pursuant to W. VA. CODE § 23-5-12a(b), the Intermediate Court of Appeals must affirm the decision of the Workers' Compensation Board of Review unless the Petitioner shows that the Administrative Law Judge's findings are:

- (1) In violation of statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the administrative law judge; or
- (3) Made upon unlawful procedures; or
- (4) Affected by other error of law; or
- (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
- (6) Arbitrary capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Administrative Law Judge's decision in the underlying protest violated statutory provisions, specifically W. VA. CODE § 23-4-9b. Accordingly, the underlying order must be reversed.

The claimant has failed to establish that he is entitled to additional permanent partial disability benefits under this claim. W. VA. CODE § 23-4-6(i) establishes that a claimant's amount of permanent partial disability will be determined by a calculation of the claimant's whole person impairment. W. VA. C.S.R. § 85-20-65 states that medical evaluators are to utilize the *AMA Guides*, Fourth Edition in determining the whole person impairment of a claimant. When considering the evidentiary weight to be given to a particular report, the adjudicator must consider the thoroughness of the report and its adherence to the *AMA Guides*, Fourth Edition. *See* W. VA. C.S.R. § 85-20-66. Dr. Mukkamala and Dr. Soulsby are qualified evaluators who

reviewed the claimant's diagnosis, treatment, and range of motion in accordance with the *AMA Guides*, Fourth Edition.

In addition to these requirements, an evaluator must attempt to apportion pre-existing impairment as required by W. VA. CODE § 23-4-9b. Under these standards, Drs. Mukkamala and Soulsby underwent necessary steps of apportionment. The only physician who failed to apportion clearly pre-existing impairment was Dr. Guberman. Dr. Guberman elected not to apportion the claimant's impairment even though the degeneration of the claimant's spine was deemed to be severe by Dr. Soulsby, a board-certified orthopedic surgeon. Dr. Soulsby noted the worsening of the claimant's range of motion over the course of months between the three evaluations presented in this case despite the absence of further injury. He reasonably related this ongoing deterioration to the degenerative conditions of the claimant's spine. Failing to account for this degeneration is impermissible when assigning an impairment rating.

In adopting Dr. Guberman's findings, the Workers' Compensation Board of Review pointed to *Duff v. Kanawha Cnty. Comm'n*, 247 W. Va. 550, 882 S.E.2d 916 (Ct. App. 2022). A key difference in the instant claim is that all three evaluators agreed on the presence of degenerative changes in the claimant's cervical spine that were unanimously found to be obvious on imaging study. Dr. Soulsby—the only board-certified orthopedic surgeon to examine the claimant—compared range of motion studies across examinations to show a worsening of the claimant's condition in the absence of injury. In light of these facts, it seems clear that apportionment of the claimant's impairment was required under W. VA. CODE § 23-4-9b.

Accordingly, the underlying order of the Board of Review should be affirmed.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully requests that this Court affirm the underlying decision of the Workers' Compensation Board of Review.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June, 2023, I served the foregoing “Brief of Respondent” upon all counsel of record through File and Serve Xpress:

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