

**STATE OF WEST VIRGINIA**  
**SUPREME COURT OF APPEALS**

**Carlton Musick,**  
**Claimant Below, Petitioner**

vs.) **No. 22-0374** (BOR Appeal No. 2057750)  
(JCN: 2019013437)

**Truline General Contracting, Inc.,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Carlton Musick appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent Truline General Contracting, Inc., filed a timely response.<sup>1</sup> The issue on appeal is the determination of the percentage of permanent partial disability to be assigned for petitioner's ankle injury. Ultimately, by order entered on April 27, 2022, the Board of Review concluded that petitioner had a total of 5% permanent partial disability. Upon our review, we determine that oral argument is unnecessary and that a memorandum decision affirming the Board of Review's decision is appropriate. *See* W. Va. R. App. P. 21.

On December 15, 2018, petitioner, a construction worker, completed an Employees' and Physicians' Report of Injury stating that he injured his left ankle when it became caught between a bobcat machine and a trailer while he was working for respondent. Petitioner was taken by ambulance to Raleigh General Hospital and diagnosed with a trimalleolar fracture of the left ankle. Petitioner underwent an open reduction and internal fixation on December 16, 2018.

Petitioner was seen for an independent medical evaluation by Joseph E. Grady, II, M.D., on May 28, 2019. Dr. Grady measured plantar flexion to be forty degrees for both of petitioner's ankles. Petitioner had twenty degrees of ankle extension for his right ankle. For petitioner's left ankle, ankle extension was fifteen degrees. Dr. Grady did not provide an impairment rating for petitioner's left ankle, finding that petitioner was not at maximum medical improvement because of the possibility of additional surgery on his left ankle. However, in a July 25, 2019, addendum report, Dr. Grady noted no additional surgery was scheduled at that time and determined that petitioner had achieved maximum medical improvement. Therefore, Dr. Grady provided an impairment rating for the left ankle according to table 42, "Ankle Motion Impairments," page 78

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<sup>1</sup>Petitioner is represented by Reginald D. Henry, and respondent is represented by H. Dill Battle, III.

of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) ("AMA Guides"). Dr. Grady stated that there was 3% impairment of the whole person due to the decreased extension of the left ankle and no impairment for plantar flexion, which was forty degrees for both of petitioner's ankles. Based upon Dr. Grady's addendum report, the claims administrator granted petitioner 3% permanent partial disability on August 27, 2019.

On January 29, 2020, petitioner underwent surgery to have screws and a plate removed from his left ankle. On July 21, 2020, petitioner had another surgery. There was a Morton's neuroma between the third and fourth toes of petitioner's left foot, which was related to the ankle injury. The Morton's neuroma was excised during the July 21, 2020, operation.

Dr. Grady performed a second independent medical evaluation of petitioner on November 24, 2020. Plantar flexion was forty degrees for the right ankle and thirty degrees for the left ankle. Dr. Grady found twenty degrees of extension for the right ankle but only five degrees of extension for the left ankle. Petitioner reported some decreased pinprick sensation on the dorsal aspect of his left foot in the vicinity of his third and fourth toes. Dr. Grady determined that petitioner reached maximum medical improvement following his two additional surgeries. Dr. Grady once again stated that there was 0% impairment for plantar flexion and 3% impairment of the whole person due to the decreased extension of the left ankle. Dr. Grady found that petitioner had an additional 1% whole person impairment based upon the *AMA Guides* for the sensory loss in his left foot. Therefore, Dr. Grady concluded that petitioner had a total of 4% whole person impairment due to his compensable injury. Based upon Dr. Grady's November 24, 2020, report, the claims administrator granted petitioner an additional 1% for a total of 4% permanent partial disability on December 9, 2020.

Petitioner was seen for an independent medical evaluation by Michael J. Kominsky, D.C., on March 12, 2021. Dr. Kominsky found petitioner to be at maximum medical improvement. Plantar flexion was twenty degrees in both of petitioner's ankles. Dr. Kominsky measured extension as twenty degrees in the right ankle and eight degrees in the left ankle. Inversion was twenty-eight degrees for the right ankle and twenty degrees for the left ankle. Pursuant to table 42 of the *AMA Guides*, Dr. Kominsky gave petitioner 3% whole person impairment for decreased plantar flexion and an additional 3% whole person impairment for decreased extension of the left ankle. Based upon table 43, "Hindfoot Impairments," page 78 of the *AMA Guides*, Dr. Kominsky stated that there was an additional 1% whole person impairment because inversion was twenty degrees. For petitioner's sensory loss, Dr. Kominsky found that he had 1% whole person impairment. Therefore, combining all of these whole person impairments, Dr. Kominsky provided an overall impairment rating of 8% total whole person impairment.

Petitioner was seen for an independent medical evaluation by David L. Soulsby, M.D., on July 27, 2021. Dr. Soulsby found that petitioner was at maximum medical improvement. Plantar flexion was sixty degrees for the right ankle and thirty-five degrees for the left ankle. Dr. Soulsby measured extension as fifteen degrees in the right ankle and eight degrees in the left ankle. Inversion was twenty-eight degrees for the right ankle and twenty degrees for the left ankle. Because "[t]he range of motion demonstrated in [petitioner's] left ankle is restricted," there was 3% whole person impairment pursuant to table 42 of the *AMA Guides*. Dr. Soulsby criticized Dr.

Kominsky's impairment rating because Dr. Kominsky rated flexion and extension of the left ankle separately. Dr. Soulsby explained that under table 42, "each individual motion is not considered." Rather, "[i]t is possible that a claimant might demonstrate restriction in both flexion and extension and still the total arc of motion would be classified using the mild category." Dr. Soulsby noted that Table 42 provides that mild impairment would be 3% whole person impairment.

Under table 43 of the *AMA Guides*, Dr. Soulsby acknowledged that petitioner had decreased motion in the hindfoot bilaterally but found that there was 1% whole person impairment given that the left hindfoot was more severely involved. In addition, Dr. Soulsby found that there was 1% whole person impairment for petitioner's sensory loss. Therefore, combining the three whole person impairments, Dr. Soulsby assigned an overall impairment rating of 5% total whole person impairment.

In its December 3, 2021, order, the Office of Judges (1) affirmed the claims administrator's August 27, 2019, decision granting petitioner 3% permanent partial disability, and (2) reversed the claims administrator's December 9, 2020, decision granting petitioner an additional 1%. The Office of Judges found that the issue before it was the amount of additional permanent partial disability petitioner had after the two surgeries he underwent in 2020. The Office of Judges further found that table 42 of the *AMA Guides* was ambiguous as to whether an evaluator may rate extension and flexion separately when calculating an injured person's impairment. However, the Office of Judges did not provide any basis for this finding. The Office of Judges next determined that Drs. Kominsky and Soulsby opined that petitioner had greater impairment than the amount of impairment calculated by Dr. Grady. However, the Office of Judges noted that while Dr. Grady produced the lowest whole person impairment for the compensable injury, Dr. Grady's impairment rating was similar to Dr. Kominsky's impairment rating in that, like Dr. Kominsky, Dr. Grady rated extension and flexion of the left ankle separately under table 42. Therefore, the Office of Judges found that Dr. Kominsky's impairment rating was "more likely than not consistent with the *AMA Guides*." Accordingly, based upon Dr. Kominsky's report, the Office of Judge granted petitioner an additional 5% for a total of 8% permanent partial disability for the compensable injury.

On April 27, 2022, the Board of Review reversed the Office of Judges' December 9, 2021, order. The Board of Review determined that Dr. Soulsby's explanation of how table 42 of the *AMA Guides* applies to calculating ankle impairment was in accordance with the example associated with table 42 on pages 77 and 78 of the *AMA Guides*. Thus, the Board of Review found that Dr. Soulsby's report provided a reliable rating of petitioner's whole person impairment and that Dr. Kominsky's impairment rating was not in accordance with the *AMA Guides*. Therefore, the Board of Review granted petitioner an additional 2% for a total of 5% permanent partial disability based upon Dr. Soulsby's report.

This Court may not reweigh the evidentiary record, but must give deference to the findings, reasoning, and conclusions of the Board of Review, and when the Board's decision effectively represents a reversal of a prior ruling of either the Workers' Compensation Commission or the Office of Judges, we may reverse or modify that decision only if it is in clear violation of constitutional or statutory provisions, is clearly the result of erroneous conclusions of law, or is so

clearly wrong based upon the evidentiary record that even when all inferences are resolved in favor of the Board's findings, reasoning, and conclusions, there is insufficient support to sustain the decision. *See* W. Va. Code §§ 23-5-15(c) & (e). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. Ins. Comm'n*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

West Virginia Code § 23-4-6(i) generally provides permanent partial disability is determined "by the degree of whole body medical impairment[.]" West Virginia Code of State Rules § 85-20-65.1 (2006) generally directs that the *AMA Guides* be utilized in the calculation of whole person impairment.

After review, we find no error in the reasoning and conclusions of the Board of Review. The Board of Review granted petitioner a total of 5% permanent partial disability based upon Dr. Soulsby's report. Drs. Soulsby and Kominsky produced similar reports as they each gave petitioner 1% whole person impairment for decreased motion in the left hindfoot and 1% whole person impairment for sensory loss. Drs. Soulsby and Kominsky each also found that petitioner had impairment of his left ankle based upon table 42 of the *AMA Guides*. While table 42 lists flexion and extension on separate lines, the Board of Review rejected Dr. Kominsky's method of giving petitioner 3% whole person impairment for decreased plantar flexion and an additional 3% whole person impairment for decreased left ankle extension. In contrast to Dr. Kominsky's method, Dr. Soulsby provided a single rating of 3% whole person impairment for the total arc of motion, reflecting both the decreased flexion and the decreased extension.

The Board of Review found that Dr. Soulsby's whole person impairment rating for petitioner's compensable injury of 5% impairment was reliable because it accorded with the example associated with table 42 on pages 77 and 78 of the *AMA Guides*. In that example, the *AMA Guides* describes an injured woman who has impairment from stiffness of all of her toes and impairment in terms of "ankle motion." After the woman in the example "lost half of the ankle flexion and extension motion," the *AMA Guides* states that there is a single whole person impairment rating for the ankle that is then combined with the whole person impairment rating for the stiffness in the toes to produce an overall whole person impairment rating. Similarly, Dr. Soulsby provided petitioner with a single whole person impairment rating of 3% for his ankle, which Dr. Soulsby combined with the 1% whole person impairment for the hindfoot and the 1% whole person impairment for the sensory loss to give petitioner an overall whole person impairment rating of 5%. Therefore, as Dr. Soulsby calculated petitioner's whole person impairment consistent with the *AMA Guides*, the Board of Review properly relied upon the Dr. Soulsby's report.

Affirmed.

**ISSUED: January 25, 2024**

**CONCURRED IN BY:**

Chief Justice Tim Armstead  
Justice Elizabeth D. Walker  
Justice John A. Hutchison  
Justice William R. Wooton  
Justice C. Haley Bunn