

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

**Jerald Saunders,**  
**Claimant Below, Petitioner**

vs.) **No. 22-0443** (BOR Appeal No. 2057702)  
(JCN: 2020010104)

**Mainstreet Ventures Restaurant,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Jerald Saunders appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent Mainstreet Ventures Restaurant filed a timely response.<sup>1</sup> The issue on appeal is the amount of permanent partial disability in the claim. The claims administrator granted the petitioner a 6% permanent partial disability award on April 3, 2020. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the decision in its December 21, 2021, order, which was affirmed by the Board of Review on May 31, 2022. 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.*

Mr. Saunders completed an Employees' and Physicians' Report of Occupational Injury or Disease on July 16, 2019, indicating he injured his right knee and left shoulder while at work as a cook on July 15, 2019. In an order dated July 18, 2019, the claims administrator held the claim compensable for left shoulder and right knee contusions. On September 17, 2019, the petitioner underwent surgery on his right knee consisting of a right knee arthroscopy with partial medial meniscectomy, debridement medial femoral condyle, debridement femoral trochlea, and excision plica. The post operative diagnoses were torn medial meniscus and osteoarthritis of the right knee. The surgery was performed by Phillip D. Surface, D.O. By order dated December 1, 2020, the

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<sup>1</sup>Petitioner, Jerald Saunders, is represented by Reginald D. Henry, and respondent, Mainstreet Ventures Restaurant, is represented by Lisa Warner Hunter. For reasons that are not readily apparent from the record, the respondent appears to have substituted "Mainstreet Ventures, Inc." for the employer identified below, "Mainstreet Ventures Restaurant." Because the orders from which the parties appeal identify the employer as Mainstreet Ventures Restaurant, we will utilize that designation in this appeal.

claims administrator added tear of the medial meniscus of the right knee as a compensable component of the claim.

There are three independent medical reports of record rendering an opinion as to the petitioner's injury related to permanent partial disability. In a report dated March 24, 2020, Paul Bachwitt, M.D., an orthopedic surgeon, listed the petitioner's range of motion testing results as:

Examination of the right uninjured shoulder showed forward flexion to be 0 to 160 degrees, extension from 0 to 50 degrees, abduction from 0 to 165 degrees, and adduction from 0 to 55 degrees. The claimant's shoulder was tested with the elbow held at a 90 degree angle and internal rotation was equal to 75 degrees and external rotation was equal to 75 degrees.

Examination of the left uninjured shoulder showed forward flexion to be 0 to 140 degrees, extension from 0 to 45 degrees, abduction from 0 to 120 degrees, and adduction from 0 to 40 degrees. The claimant's shoulder was tested with the elbow held at a 90 degree angle with internal rotation equal to 50 degrees and external rotation equal to 70 degrees.

After examining the petitioner's lower extremities, Dr. Bachwitt found that the right knee showed full extension with flexion to 112 degrees, with moderate effusion present. Examination of the left previously operated upon knee showed full extension with flexion to 120 degrees, with no effusion present.

Mr. Saunders was found to be at maximum medical improvement, and Dr. Bachwitt diagnosed the petitioner with a tear of the medial meniscus of the right knee superimposed on preexisting degenerative arthritis, status post partial medial meniscectomy, and a left shoulder sprain/strain. In regard to the left shoulder, Dr. Bachwitt found 8% upper extremity impairment. Using Table 3, page 20, of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993) ("AMA Guides"), Dr. Bachwitt determined that the 8% upper extremity impairment is equal to 5% whole person impairment. The petitioner's arthroscopic right knee partial medial meniscectomy was rated to be 1% whole person impairment. Dr. Bachwitt then combined the 5% whole person impairment for the left shoulder and the 1% whole person impairment for the right knee to equal 6% whole person impairment for a total recommendation for the July 15, 2019, injury.

Based upon Dr. Bachwitt's report, the claims administrator granted Mr. Saunders a 6% permanent partial disability award on April 3, 2020. The claims administrator issued an order dated December 1, 2020, updating the diagnoses to include tear of medial meniscus, right knee. The petitioner protested the claims administrator's decision dated April 3, 2020, and underwent another independent medical evaluation with Bruce A. Guberman, M.D., on January 11, 2021. Dr. Guberman noted that the petitioner had a non-work-related injury to his left knee at the age of 20, which resulted in surgery and resolved with no sequelae. Examination of the right shoulder revealed no tenderness, redness, warmth, or swelling. Range of motion of the right shoulder measured 170 degrees flexion, 170 degrees abduction, 50 degrees extension, 50 degrees adduction,

80 degrees internal rotation, and 80 degrees external rotation. Dr. Guberman did not find any tenderness, redness, warmth, or swelling of the left shoulder. The range of motion for the left shoulder measured 140 degrees flexion, 110 degrees abduction, 50 degrees extension, 50 degrees adduction, 60 degrees internal rotation, and 60 degrees external rotation. Dr. Guberman found moderate tenderness and crepitations, along with mild swelling, in the petitioner's right knee. The range of motion for the knee measured 106 degrees flexion with no extension beyond 8 degrees of flexion. The left knee revealed mild crepitations but no tenderness, redness, warmth, or swelling. The impression listed by Dr. Guberman was chronic posttraumatic strain of the right knee with medial meniscal tear; status post partial medial meniscectomy, debridement of the medial femoral condyle and the femoral trochlea with excision of plica on September 7, 2019; and chronic posttraumatic strain of the left shoulder.

Dr. Guberman found that Mr. Saunders continued to have pain, tenderness, swelling, crepitations, and range of motion abnormalities at the right knee, and he had persistent range of motion abnormalities of the left shoulder as a result of the July 15, 2019, injury. The petitioner was found to be at maximum medical improvement with no further treatment needed to improve his impairment. Dr. Guberman recommended the following impairment rating:

In regard to the left shoulder injury, from Figure 38 of page 43 of the Guides, the claimant receives a 3 percent impairment of the upper extremity for range of motion abnormalities in flexion and extension of the left shoulder. From Figure 41 of page 44 of the Guides, the claimant receives a 3% impairment of the upper extremity for range of motion abnormalities in abduction and adduction of the left shoulder. In addition, from Figure 44 of page 45 of the Guides, the claimant receives a 2 percent impairment of the upper extremity for the range of motion abnormalities in internal and external rotation of the left shoulder. There are all added for a total of an 8 percent impairment of the upper extremity due to range of motion abnormalities at the left shoulder. From Table 3 of page 20 of the Guides, the 8 percent impairment of the upper extremity equals a 5 percent impairment of the whole person. That is the impairment rating recommended for the left shoulder injury.

Dr. Guberman combined the 4% impairment of the whole person for the right knee injury with the 5% impairment for the left shoulder injury for a total of 9% whole person impairment. Since the petitioner had already received a 6% award, Dr. Guberman recommended an additional 3% whole person impairment for the compensable injury.

The petitioner was examined for an independent medical evaluation by Prasadarao B. Mukkamala, M.D., on May 3, 2021, at the request of the employer. Dr. Mukkamala determined that the petitioner had reached maximum medical improvement for the July 15, 2019, injury. With respect to the right knee, Dr. Mukkamala agreed with the claims administrator's order accepting the medial meniscal tear of the right knee as compensable and denying the diagnosis of primary osteoarthritis. Based on the range of motion findings, the petitioner was found to have 1% whole person impairment for the shoulder injury and 1% impairment for the right knee based upon the meniscus surgery. Dr. Mukkamala agreed with Dr. Bachwitt regarding the right knee impairment, and he disagreed with Dr. Guberman because the right knee range of motion was normal at the

time of evaluation. For the left shoulder, Dr. Mukkamala disagreed with both Dr. Bachwitt and Dr. Guberman because he found that the petitioner's shoulder had significantly improved after the previous evaluations.

In a final decision dated December 21, 2021, the Office of Judges found that Mr. Saunders has not proven by a preponderance of the evidence that he is entitled to a permanent partial disability award in excess of the 6% permanent partial disability awarded by the claims administrator. It was concluded that the report of Dr. Bachwitt is the most reliable report for determining permanent partial disability. Dr. Mukkamala's report was found to be less reliable regarding his findings in respect to the petitioner's left shoulder. Dr. Guberman's report was also deemed an outlier because of his range of motion results of the right knee. The Office of Judges determined that Dr. Bachwitt conducted a complete examination and properly applied his medical findings to the *AMA Guides*. As a result, the claims administrator's order dated April 3, 2020, granting a 6% permanent partial disability award was affirmed. The Board of Review adopted the findings of fact and conclusions of law of the Office of Judges and affirmed the decision in an order dated May 31, 2022.

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 affirms prior rulings by both the Workers' Compensation Commission and 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 based upon a material misstatement or mischaracterization of the evidentiary record. *See* W. Va. Code §§ 23-5-15(c) & (d). We apply a de novo standard of review to questions of law. *See Justice v. W. Va. Off. Of Ins. Comm'n*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

After review, we agree with the decision of the Office of Judges, as affirmed by the Board of Review. The petitioner argues that the preponderance of the evidence establishes that he sustained more than 6% permanent partial disability from his compensable injury. The petitioner further argues that because nothing in the facts or medical record supports Dr. Bachwitt's findings over Dr. Guberman's findings, that the Office of Judges should have rendered a decision that favors the claimant's position under West Virginia Code § 23-4-1g.<sup>2</sup> Although Dr. Guberman

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<sup>2</sup>West Virginia Code § 23-4-1g provides guidance for the weighing of evidence:

(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

opined that the petitioner has 9% whole person impairment for the right knee injury combined with the left shoulder injury, the Office of Judges found Dr. Guberman's assessment of the petitioner's right knee to be out of line with the other two evaluators of record who found normal range of motion for the right knee. As the Board of Review's determination is not based upon a material misstatement or mischaracterization of the evidentiary record, we find that the Board of Review did not err in affirming the December 21, 2021, decision of the Office of Judges.

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

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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.