

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

**Kelly Messer,**  
**Claimant Below, Petitioner**

vs.) **No. 22-604** (BOR Appeal No. 2057780)  
(JCN: 2019001506)

**Autozone, Inc.,**  
**Employer Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Kelly Messer appeals the decision of the West Virginia Workers' Compensation Board of Review ("Board of Review"). Respondent Autozone, Inc., filed a timely response.<sup>1</sup> The issue on appeal is entitlement to permanent partial disability. The claims administrator granted petitioner 0% permanent partial disability on July 23, 2020. The Workers' Compensation Office of Judges ("Office of Judges") affirmed the claims administrator's decision in its January 10, 2022, order. The order was affirmed by the Board of Review on June 29, 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.

On June 29, 2018, petitioner, a sales manager, completed an Employees' and Physicians' Report of Injury stating that on June 27, 2018, she dislocated her left kneecap at her employment when she hit her left knee on the side of a ladder while she was climbing down it. In the physician's section of the form, a representative of MedExpress Urgent Care stated that petitioner sprained her left knee as a result of an occupational injury.<sup>2</sup> The claims administrator held the claim compensable for a left knee sprain on July 3, 2018.

Petitioner was seen for an independent medical evaluation by Bruce F. Haupt, M.D., on August 2, 2019. Dr. Haupt opined that petitioner had a medial meniscus tear that was related to the compensable injury. Based upon Dr. Haupt's report, the claims administrator ruled on September 17, 2019, that the claim included a torn meniscus as a compensable condition. Petitioner underwent surgery on January 23, 2020. The operation revealed that petitioner did not have a medial meniscus tear.

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<sup>1</sup>Petitioner is represented by Reginald D. Henry, and respondent is represented by T. Jonathan Cook.

<sup>2</sup>The signature of the representative of MedExpress Urgent Care is not legible.

Petitioner was seen for an independent medical evaluation by Prasadarao B. Mukkamala, M.D., on July 8, 2020. Dr. Mukkamala found that petitioner was at maximum medical improvement. Petitioner walked with a limp on her left side. Dr. Mukkamala stated that petitioner should lead with her uninjured right leg when going up and down steps, and petitioner should not lift more than ten pounds. However, Dr. Mukkamala found that petitioner had normal range of motion. Therefore, Dr. Mukkamala gave petitioner 0% impairment based upon table 41 on page 78 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) ("AMA Guides"). Dr. Mukkamala further determined that petitioner's January 23, 2020, surgery was reasonably required to treat the compensable injury despite the lack of a torn meniscus, as petitioner's symptoms began after the injury occurred. On the other hand, petitioner did not have a knee condition listed on table 64 on page 85 of the AMA Guides. Thus, Dr. Mukkamala provided petitioner 0% impairment based upon table 64. Accordingly, Dr. Mukkamala concluded that the compensable injury produced 0% impairment. Given Dr. Mukkamala's finding of no impairment, the claims administrator granted petitioner 0% permanent partial disability on July 23, 2020.

Petitioner was seen for an independent medical evaluation by Bruce A. Guberman, M.D., on May 20, 2021. Like Dr. Mukkamala, Dr. Guberman determined that petitioner had no range of motion limitations and stated that there was 0% impairment according to table 41 on page 78 of the AMA Guides. Dr. Guberman similarly gave petitioner 0% impairment based upon table 64 on page 85 of the AMA Guides because her January 23, 2020, surgical procedure was not included on table 64. Dr. Guberman differed from Dr. Mukkamala in that Dr. Guberman found that petitioner had 2% impairment due to the footnote to table 62 on page 83 of the AMA Guides, which requires the claimant to have no joint space narrowing shown on x-rays.<sup>3</sup> In his report, Dr. Guberman noted that an x-ray of petitioner's left knee from June 29, 2018, was normal but failed to state whether the x-ray revealed an absence of joint space narrowing.

In its January 10, 2022, order, the Office of Judges affirmed the claims administrator's decision granting petitioner 0% permanent partial disability. The Office of Judges found that Dr. Guberman misapplied the footnote to table 62 on page 83 of the AMA Guides by failing to address whether petitioner's x-ray did not reveal joint space narrowing. Accordingly, the Office of Judges found no support for Dr. Guberman's 2% rating. By order entered on June 29, 2022, the Board of Review affirmed the Office of Judges' order, finding that Dr. Guberman's statement that petitioner's x-ray was normal did not indicate that the Office of Judges erred in determining that Dr. Guberman misapplied the footnote to table 64.

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

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<sup>3</sup>The footnote to table 62 on page 83 of the AMA Guides states, in pertinent part, that "[i]n a patient with a history of direct trauma, a complaint of patellofemoral pain, and crepitation on physical examination, but without joint space narrowing on roentgenograms, a 2% whole-person . . . impairment is given."

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. Ins. Comm'n*, 230 W. Va. 80, 83, 736 S.E.2d 80, 83 (2012).

“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. 2, *Gill v. City of Charleston*, 236 W. Va. 737, 783 S.E.2d 857 (2016). In addition, West Virginia Code § 23-4-6(i) generally provides that 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 Office of Judges as affirmed by the Board of Review. In *Price v. West Virginia Office of Insurance Commissioner*, No. 101246, 2011 WL 8183244 (W. Va. Nov. 15, 2011) (memorandum decision), the 2% impairment rating provided by Dr. Guberman in that case was found to be a misapplication of the *AMA Guides* because “Dr. Guberman failed to examine any x-rays to confirm the absence of joint space narrowing as required by [the footnote to] Table 62.” *Id.*, at \*1. Petitioner argues that the instant case is distinguishable from *Price*. According to petitioner, because Dr. Guberman found that petitioner’s x-ray was normal, Dr. Guberman “obvious[ly]” determined that the x-ray revealed an absence of joint space narrowing, which is the finding necessary to give petitioner 2% impairment according to table 62’s footnote. However, “[w]here proof offered by a claimant to establish his claim is based wholly on speculation, such proof is unsatisfactory and is inadequate to sustain the claim.” Syl. Pt. 4, *Clark v. State Workmen’s Comp. Comm’r*, 155 W. Va. 726, 187 S.E.2d 213 (1972). Petitioner cannot show her entitlement to a permanent partial disability award based on speculation as to what Dr. Guberman “obvious[ly]” found by stating petitioner’s x-ray was normal. We find no error in the Office of Judges’ determination, as affirmed by the Board of Review, that Dr. Guberman misapplied the footnote to table 62 on page 83 of the *AMA Guides*. Accordingly, we affirm the award of 0% permanent partial disability.

Affirmed.

**ISSUED: January 25, 2024**

**CONCURRED IN BY:**

Chief Justice Tim Armstead  
Justice Elizabeth D. Walker  
Justice C. Haley Bunn

**DISSENTING:**

Justice John A. Hutchison  
Justice William R. Wooton

Hutchison, Justice and Wooton, Justice, dissenting:

We dissent to the majority's resolution of this case. We would have set this case for oral argument to thoroughly address the error alleged in this appeal. Having reviewed the parties' briefs and the issues raised therein, we believe a formal opinion of this Court was warranted, not a memorandum decision. Accordingly, we respectfully dissent.