

**STATE OF WEST VIRGINIA  
WORKERS' COMPENSATION BOARD OF REVIEW**

IN THE MATTER OF:

David Duff, II,  
CLAIMANT

JCN: 2021000317

DOI: June 15, 2020

and

Kanawha County Commission,  
EMPLOYER

**ORDER**

**PARTIES:**

Claimant, David Duff, II, by counsel, William B. Gerwig, III  
Employer, Kanawha County Commission, by counsel, H. Dill Battle, III

**ISSUE:**

The claimant protested the claim administrator's order dated June 17, 2021, which granted the claimant a 13% permanent partial disability (PPD) award.

**DECISION:**

It is hereby ORDERED that the claim administrator's order dated June 17, 2021, granting the claimant the claimant a 13% PPD award, be AFFIRMED.

**RECORD CONSIDERED:**

See attached.

**FINDINGS OF FACT:**

1. Per the Employees' and Physicians' Report of Occupational Injury dated July 13, 2020 (in the electronic claim file under the date of July 8, 2020), the claimant alleged an occupational injury to his back, left hip and other areas on June 15, 2020, when he lifted a bomb squad robot out of a truck. Per the physician's section, the body part injured was the lumbar spine and the description of the injury was sprain of the lumbar ligaments.

2. By claim administrator's order dated July 14, 2020, the claim was held compensable for lumbar, left hip, pelvis, and sacrum strain.

*Ex. I, p. 71-79*

3. The claimant submitted the testimony of Prasadarao B. Mukkamala, M.D., taken by deposition on August 10, 2016. The deposition was conducted in a claim involving a different claimant. Such was reviewed and considered.

4. The employer submitted the medical records of McKinney Chiropractor dated September 26, 2018 through June 23, 2020 (the records dated June 22, 2020 and June 23, 2020, are in the electronic claim file under their respective dates). The records indicated that the claimant had lower back pain and stiffness from the time he started working in 1999. The claimant reported that it was difficult to perform activities of daily living (ADL). The goals of the chiropractic treatment were to improve thoracolumbar range of motion (ROM), decrease pain, restore ROM, and improve ADL's without pain. The diagnosis was segmental and somatic dysfunction of the lumbar, cervical, thoracic, sacral, and pelvic region; and radiculopathy of the lumbar, cervical, thoracic, sacral, and sacrococcygeal region.

5. The employer submitted the medical records of McKinney Chiropractor dated July 1, 2020 through October 21, 2020. The claimant presented with intense lower back pain and left leg pain from lifting a piece of equipment at work. The diagnosis was sprain of lumbar ligaments; sprain of other parts of lumbar/pelvis; sprain of sacroiliac joint; sprain of joints and ligaments of other parts of the neck; and sprain of ligaments of the thoracic spine.

6. The claimant and the employer submitted the MRI report of the lumbar spine dated July 14, 2020, which revealed a L3-L4 left foraminal/far left lateral disc protrusion which caused moderate left neural foraminal narrowing.

7. The employer submitted the medical records of Robert J. Crow, M.D., dated August 5, 2020 through March 19, 2021. The post-L3-L4 fusion records indicated that the claimant had complete resolution of the left leg pain.

8. The employer submitted the Operative Report dated August 19, 2020. The procedure performed was left lumbar L3 transforaminal epidural steroid injection.

9. The claimant submitted the claim administrator's order dated September 24, 2020, which granted authorization for L3-L4 fusion.

10. The claimant and the employer submitted the Operative Report dated November 3, 2020. The procedure performed was L3-L4 posterior lumbar interbody fusion.

11. The employer submitted the return-to-work notice dated November 30, 2020. The claimant was released to light duty with no lifting beyond 20 pounds and was to be involved in no altercations.

12. The employer submitted the medical report of Dr. Mukkamala dated June 9, 2021. The claimant presented with occasional low back pain and left leg weakness.

The diagnosis was lumbar sprain associated with disc herniation, status post L3-L4 fusion, and the claim was also accepted for sprain of the sacroiliac joint. Based upon the *AMA Guides to the Evaluation of Permanent Impairment*, 4<sup>th</sup> Edition (*Guides*), Dr. Mukkamala opined that the claimant had a total whole person impairment (WPI) of 25% of the lumbar spine. Dr. Mukkamala then placed the claimant in Category V of Rule 20 and adjusted the claimant's impairment to 25%. Dr. Mukkamala then apportioned 12% to pre-existing degenerative spondyloarthropathy and 13% to the compensable injury.

13. The claimant submitted the medical report of Bruce A. Guberman, M.D., dated July 28, 2021. The claimant presented with a low back injury. The claimant reported that before the compensable injury he would have occasional back pain and would see Dr. McKinney intermittently and that the back pain did not radiate into his legs. He reported that he never had an MRI of the lumbar spine nor took any medication for his back on an ongoing basis prior to the compensable injury. The impression was chronic post-traumatic strain of the lumbar spine and disc herniation with radiculopathy at the L3-L4 level due to injury occurring at work on June 15, 2020, and status-post L3-L4 decompressive laminectomy, bilateral facetectomy and fusion on November 3, 2020. Based upon the *Guides*, Dr. Guberman opined that the claimant had a total WPI of 25% of the lumbar spine. Dr. Guberman then placed the claimant in Category V of Rule 20 and found no adjustment was necessary. Dr. Guberman opined that apportionment was not necessary. Dr. Guberman stated that "Although imaging studies do reveal evidence of degenerative joint and disc disease of the lumbar spine, which was at last in part present before the current injury, as far as can be determined, the claimant would not have qualified for any impairment rating using either the Range of Motion Model or Table 85-20-C before the current injury." Dr. Guberman reported that Dr. Mukkamala failed to offer any rationale why he split his 25% impairment rating in half.

14. The employer submitted the medical record of Dr. Crow dated August 18, 2021. The assessment was clinically and radiographically stable, nine months after L3-L4 fusion.

15. The employer submitted the medical report of David L. Soulsby, M.D., dated December 1, 2021. Dr. Soulsby examined the claimant's low back and offered a WPI rating. No low back examination form was attached to the report and therefore, pursuant to W. Va. C.S.R. §85-20-66.2 "A report and opinion submitted regarding the degree of permanent whole body medical impairment as a result of a back injury without a completed back examination form shall be disregarded."

16. The employer submitted the undated First Report of Injury (in the electronic claim file under the date of August 5, 2021). Such was reviewed and considered.

17. The claimant submitted a Closing Statement dated April 4, 2022.

18. The employer submitted a Closing Argument dated April 4, 2022.

**DISCUSSION:**

W. Va. Code §23-4-1g provides that, for all awards made on and after July 1, 2003, the resolution of any issue shall be based upon 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. No issue may 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. The resolution of issues in claims for compensation must be decided on the merits and not according to any principle that requires statutes governing workers' compensation to be liberally construed because they are remedial in nature. If, after weighing all the evidence regarding an issue, there is a finding that an equal amount of evidentiary weight exists for each side, the resolution that is most consistent with the claimant's position will be adopted.

Preponderance of the evidence means proof that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence, when considered and compared with opposing evidence, is more persuasive or convincing. Preponderance of the evidence may not be determined by merely counting the number of witnesses, reports, evaluations, or other items of evidence. Rather, it is determined by assessing the persuasiveness of the evidence including the opportunity for knowledge, information possessed, and manner of testifying or reporting.

The issue is the amount of claimant's PPD. This award is for residual disability, which will remain with the claimant after his or her recovery. It is referred to as "partial" because, even though it may affect an individual's ability to work and enjoy life, the individual is not totally disabled because of it.

If a party protests the Order pertaining to an award, the parties have an opportunity to present evidence concerning the claimant's disability. Evidence of PPD in the form of testimony and reports by physicians and other experts may be submitted. The fact that a particular expert may find a certain percentage of PPD does not mean the Board of Review is required to accept it. All reliable, probative, and substantial evidence will be weighed and considered in determining if the PPD awarded is correct.

Dr. Mukkamala and Dr. Guberman both opined that the claimant had a total WPI of 25% of the low back after the application of Rule 20. However, in determining the impairment related to the compensable injury, Dr. Mukkamala apportioned while Dr. Guberman did not.

The evidence on record indicates that apportionment should occur and is proper. The records of McKinney Chiropractor dated up to less than two months before the compensable injury, establish almost a two-year history of low back pain and treatment consisting of approximately 30 office visits. The records report a lumbar diagnosis and

show a loss of ROM due to the pre-existing back condition as evidenced by the treatment goal to improve and restore his ROM. Thus, the records do establish a pre-existing back condition with a definite ascertainable functional impairment.

Although Dr. Guberman disagreed with Dr. Mukkamala's apportioning, the evidence does establish a pre-existing lumbar diagnosis and ROM loss of the lumbar spine. Further, Dr. Guberman reports no review of any records from McKinney Chiropractor. Thus, Dr. Guberman's opinion that the claimant would not have qualified for any impairment prior to the compensable injury is based upon incomplete evidence.

The claimant argues that he is entitled to a 25% PPD award because he still would have been placed in lumbar Category V for the authorized fusion despite any pre-existing back conditions or ROM loss. However, regarding apportionment, in the Memorandum Decision of *Scott vs. Welded Construction, LP*, No. 19-1164 (February 19, 2021), the Supreme Court of Appeals of West Virginia (Court) held that C.S.R. §85-20 provides that the lumbar spine is to be assessed in its entirety and does not provide for separate injuries to each individual lumbar disc. In *Scott*, the claimant was placed into lumbar Category IV of Rule 20 due to a lumbar fusion at L1-L2 and found to have a 20% WPI for the compensable work injury by Dr. Grady. The claimant was previously granted a 10% PPD award for an injury involving a different lumbar level. The Court affirmed the Board of Review's holding that apportionment was proper for the prior 10% PPD award. Thus, the lumbar spine is to be assessed in its entirety and therefore, apportionment is to occur.

It is further argued that Dr. Mukkamala's apportionment of 12% to pre-existing conditions was arbitrary. However, no medical opinion in which apportionment occurs has been submitted that refutes Dr. Mukkamala's amount of apportionment. Whereas it has been determined that apportionment is to occur, Dr. Mukkamala's report is most in accordance with the evidentiary record.

#### **CONCLUSIONS OF LAW:**

The claimant has not established by a preponderance of the evidence that he has sustained a greater impairment than the 13% recommended by Dr. Mukkamala.

Accordingly, it is hereby ORDERED that the claim administrator's order dated June 17, 2021, granting the claimant a 13% PPD award, be AFFIRMED.

**APPEAL RIGHTS:**

Under the provisions of West Virginia Code §23-5-12a, any aggrieved party may file a written appeal within thirty (30) days after receipt of any decision or final action of the Board of Review. **The appeal shall be filed with the West Virginia Intermediate Court of Appeals (304-558-3258).**

Date: July 26, 2022

  
Nick Casey, Chairperson

cc: DAVID H DUFF II  
WILLIAM B. GERWIG, III - COUNSEL FOR CLAIMANT  
KANAWHA COUNTY COMMISSION  
H. DILL BATTLE, III - COUNSEL FOR EMPLOYER  
BRICKSTREET MUTUAL INSURANCE CO

JCN: 2021000317  
Date: July 26, 2022

Record Considered

Issue:

The claimant's protest to the claim administrator's order of June 17, 2021, regarding PERMANENT PARTIAL AWARD.

EVIDENCE SUBMITTED:

Claimant Evidence

Document Type: Not Specified  
Document Date: 8/10/2016  
Submit Date: 12/10/2021  
Author: Deposition Transcript/Dr. Prasadarao  
Mukkamala

Document Type: Not Specified  
Document Date: 7/14/2020  
Submit Date: 12/10/2020  
Author: MRI REPORT/DR GARRETT WALTERS

Document Type: Not Specified  
Document Date: 9/24/2020  
Submit Date: 6/21/2021  
Author: CLAIMS ADMIN ORDER

Document Type: Not Specified  
Document Date: 11/3/2020  
Submit Date: 6/21/2021  
Author: ROBERT CROW JR MD/OPERATIVE REPORT

Document Type: Not Specified  
Document Date: 7/28/2021  
Submit Date: 8/5/2021  
Author: BRUCE GUBERMAN MD/MEDICAL REPORT

Employer Evidence

Document Type: Not Specified  
Document Date: 9/26/2018  
Submit Date: 10/4/2021  
Author: MEDICAL RECORDS ROM MCKINNEY CHIROPRACTIC

9/26/18-5/01/20

Document Type: Not Specified  
Document Date: 6/22/2020  
Submit Date: 11/16/2021  
Author: GABRIEL MCKINNEY DC/CHART NOTES

Document Type: Not Specified  
Document Date: 6/23/2020  
Submit Date: 10/4/2021  
Author: TINA BEATTY PAC OFFICE NOTE

Document Type: Not Specified  
Document Date: 6/23/2020  
Submit Date: 11/16/2021  
Author: GABRIEL MCKINNEY DC/CHART NOTES

Document Type: Not Specified  
Document Date: 7/1/2020  
Submit Date: 8/5/2021  
Author: MCKINNEY FAMILY CHIROPRACTIC RECORDS 7/1/  
20 TO 10/21/20

Document Type: Not Specified  
Document Date: 7/8/2020  
Submit Date: 8/5/2021  
Author: EMPLOYEE AND PHYSICIAN REPORT OF INJURY

Document Type: Not Specified  
Document Date: 7/14/2020  
Submit Date: 8/5/2021  
Author: CLAIMS ADMIN ORDER

Document Type: Not Specified  
Document Date: 7/14/2020  
Submit Date: 8/5/2021  
Author: LUMBAR SPINE MRI

Document Type: Not Specified  
Document Date: 8/5/2020  
Submit Date: 8/5/2021  
Author: ROBERT CROW MD OFFICE NOTES

Document Type: Not Specified  
Document Date: 8/19/2020  
Submit Date: 8/5/2021  
Author: WV ORTHONEURO OPERATIVE REPORT

Document Type: Not Specified  
Document Date: 11/3/2020  
Submit Date: 8/5/2021  
Author: ROBERT CROW JR. MD OPERATIVE REPORT



Document Type: Not Specified  
Document Date: 11/30/2020  
Submit Date: 8/5/2021  
Author: WV ORTHONEURO RETURN TO WORK NOTICE

Document Type: Not Specified  
Document Date: 6/9/2021  
Submit Date: 8/5/2021  
Author: PRASADARAO MUKKAMALA MD/IME REPORT

Document Type: Not Specified  
Document Date: 6/17/2021  
Submit Date: 8/5/2021  
Author: CLAIMS ADMINISTRATORS ORDER/13 % PPD  
AWARD

Document Type: Not Specified  
Document Date: 8/5/2021  
Submit Date: 8/5/2021  
Author: EMPLOYER FIRST REPORT OF INJURY

Document Type: Not Specified  
Document Date: 8/18/2021  
Submit Date: 10/4/2021  
Author: ROBERT CROW MD OFFICE NOTE

Document Type: Not Specified  
Document Date: 12/1/2021  
Submit Date: 12/7/2021  
Author: DAVID SOULSBY MD/IME REPORT

**CLOSING ARGUMENTS:**

Party Submitted: Claimant  
Letter Date: 4/4/2022  
Party Submitted: Employer  
Letter Date: 4/4/2022