

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

**HILLTOP AUTO REPAIR,
Employer Below, Petitioner**

v.) No. 23-ICA-529 (JCN: 2021022958)

**CECIL RINER,
Claimant Below, Respondent**

**FILED
April 22, 2024**

ASHLEY N. DEEM, DEPUTY CLERK
INTERMEDIATE COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Hilltop Auto Repair (“Hilltop”) appeals the October 25, 2023, order of the Workers’ Compensation Board of Review (“Board”). Respondent Cecil Riner filed a response.¹ Hilltop did not reply. The issue on appeal is whether the Board erred in reversing the claim administrator’s order, which granted Mr. Riner a 4% permanent partial disability (“PPD”) award, instead granting him an additional 1% PPD award, for a total PPD award of 5%.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2022). After considering the parties’ arguments, the record on appeal, and the applicable law, this Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the Board’s order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Mr. Riner submitted an Employees’ and Physicians’ Report of Occupational Injury dated May 1, 2021, indicating that he was removing parts and tires while working at Hilltop, and he felt a pull in his right shoulder.² On May 29, 2021, Mr. Riner underwent a right shoulder MRI, revealing a full-thickness tear of the right rotator cuff involving the infraspinatus tendon, a partial thickness tear of the infraspinatus tendon, moderate to severe impingement related to osteophytes at the acromioclavicular joint and distal clavicle, glenohumeral osteoarthritis with thinning of the labrum, bicep tendonitis, and degenerative cyst formation with the humeral head with osseous contusion.

¹ Hilltop is represented by Jeffrey B. Brannon, Esq. Mr. Riner is represented by Reginald D. Henry, Esq., and Lori J. Withrow, Esq.

² Mr. Riner had a prior compensable right shoulder injury in 1995. He received a 3% PPD award for range of motion abnormalities related to his 1995 shoulder injury.

On June 1, 2021, the claim administrator issued an order holding the claim compensable for strain of the right shoulder/upper arm. On August 18, 2021, the claim administrator issued an order authorizing right shoulder arthroscopy with open rotator cuff repair.

Mr. Riner was evaluated by Prasadarao Mukkamala, M.D., on September 14, 2022. Dr. Mukkamala's assessment was rotator cuff tear of the right shoulder and noncompensable degenerative arthrosis of right shoulder. Dr. Mukkamala found Mr. Riner to be at maximum medical improvement ("MMI") for his compensable right shoulder injury. Using the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) ("*Guides*"), Dr. Mukkamala found that Mr. Riner had 4% whole person impairment ("WPI") for range of motion abnormalities in the right shoulder. Dr. Mukkamala did not apportion any of the impairment to noncompensable conditions. On September 21, 2022, the claim administrator issued an order granting Mr. Riner a 4% PPD award based on Dr. Mukkamala's report. Mr. Riner protested this order.

On November 1, 2022, Mr. Riner was evaluated by Bruce Guberman, M.D. Dr. Guberman opined that Mr. Riner had reached MMI for his compensable right shoulder injury. Using the *Guides*, Dr. Guberman found 8% WPI for range of motion abnormalities in Mr. Riner's right shoulder. Due to Mr. Riner's prior PPD award of 3% for the right shoulder in 1995, Dr. Guberman deducted 3% of this rating, for a total of 5% WPI related to the 2021 right shoulder injury.

On October 25, 2023, the Board reversed the claim administrator's order which granted Mr. Riner a 4% permanent partial disability ("PPD") award, instead granting him an additional 1% PPD award, for a total PPD award of 5%. The Board found that Mr. Riner established that he sustained 5% impairment due to the compensable injury. Hilltop now appeals the Board's order.

Our standard of review is set forth in West Virginia Code § 23-5-12a(b) (2022), in part, as follows:

The Intermediate Court of Appeals may affirm the order or decision of the Workers' Compensation Board of Review or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the Workers' Compensation Board of Review, if the substantial rights of the petitioner or petitioners have been prejudiced because the Board of Review's findings are:

- (1) In violation of statutory provisions;
- (2) In excess of the statutory authority or jurisdiction of the Board of Review;
- (3) Made upon unlawful procedures;
- (4) Affected by other error of law;

- (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Duff v. Kanawha Cnty. Comm'n, 247 W. Va. 550, 555, 882 S.E.2d 916, 921 (Ct. App. 2022).

On appeal, Hilltop argues that the Board was clearly wrong in finding that apportionment was not appropriate in this case. Further, Hilltop argues that the Board was clearly wrong in finding that the reports of Dr. Guberman and Dr. Mukkamala were of equal evidentiary weight. Finally, Hilltop argues that the Board was unclear regarding how to calculate Mr. Riner's PPD award for the 2021 injury and how the 1995 PPD award would affect the 2021 award. We disagree.

Here, the Board found that Mr. Riner established that he was entitled to a 5% PPD award. The Board found that the reports of both Dr. Mukkamala and Dr. Guberman were equally reliable. The Board specifically found that there was no medical evidence of record to support a finding that either physician's range of motion findings are more or less reliable than the other. Thus, the Board adopted Dr. Guberman's findings under West Virginia Code § 23-4-1g (2003).³ The Board noted that Dr. Mukkamala was aware of Mr. Riner's degenerative right shoulder condition, and he chose not to apportion any of the impairment to Mr. Riner's preexisting degenerative condition.

Upon review, we find that the Board was not clearly wrong in finding that Mr. Riner established that he was entitled to a 5% PPD award, based on the report of Dr. Guberman. We find no merit in Hilltop's request that this claim should be remanded for a third evaluation because Dr. Mukkamala did not have information regarding Mr. Riner's prior PPD award in 1995. We decline to remand based on Hilltop's failure to give that information to Dr. Mukkamala, the evaluator chosen by the claim administrator; alternatively, Hilltop could have referred Mr. Riner for another evaluation while the claim was pending before the Board. Further, we note that Dr. Mukkamala was aware of Mr. Riner's degenerative right shoulder condition, and he chose not to apportion for that degenerative condition.

Additionally, we find no merit in Hilltop's argument that the Board was unclear regarding how to calculate Mr. Riner's PPD award for the 2021 injury. We find that the Board was clear in finding that the entire 5% PPD award was related to the 2021 injury and

³ West Virginia Code § 23-4-1g (2003) provides, "[i]f, after weighing all of the evidence regarding an issue in which a claimant has an interest, there is a finding that an 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."

the impairment had already been adjusted by Dr. Guberman for Mr. Riner's prior 1995 award. Thus, the entire 5% PPD award is related to the 2021 injury and no further adjustments need to be made regarding the 1995 PPD award.

Accordingly, we affirm the Board's October 25, 2023, order.

Affirmed.

ISSUED: April 22, 2024

CONCURRED IN BY:

Chief Judge Thomas E. Scarr
Judge Charles O. Lorensen
Judge Daniel W. Greear