

**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**

**CABELL COUNTY COMMISSION,  
Employer Below, Petitioner**

v.) No. 23-ICA-546 (JCN: 2022017997)

**DANIELLE MCCOY,  
Claimant Below, Respondent**

**FILED  
April 22, 2024**

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

**MEMORANDUM DECISION**

Petitioner Cabell County Commission (“the Commission”) appeals the November 7, 2023, order of the Workers’ Compensation Board of Review (“Board”). Respondent Danielle McCoy timely filed a response.<sup>1</sup> Cabell County Commission filed a reply. The issue on appeal is whether the Board erred in reversing the claim administrator’s order, which granted Ms. McCoy a 3% permanent partial disability (“PPD”), and instead granting her a 15% PPD award.

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.

Ms. McCoy was injured while at work on January 24, 2022, when she slipped on a plastic mat at work and fell backward, hitting her lower back on a desk. Ms. McCoy was employed by the Commission as a housekeeper. Following the incident, Ms. McCoy developed pain in her left lower extremity, back, neck, head, and shoulder. On January 25, 2022, Ms. McCoy completed an Employees’ and Physicians’ Report of Occupational Injury. The physician’s portion of the claim application was completed by a medical provider at St. Mary’s who indicated that Ms. McCoy had sustained an occupational injury resulting in a low back contusion, a pelvis contusion, a lumbar sprain, and a neck sprain.

On March 10, 2022, the claim administrator held the claim compensable for neck and lumbar sprain. On March 17, 2022, Ms. McCoy underwent an MRI. The MRI revealed mild multilevel degenerative changes, and some subtle anterolisthesis from degenerative changes at L3-L4 and L4-L5. There was no focal disc protrusion or high-grade stenosis.

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<sup>1</sup> The Commission is represented by Charles R. Bailey, Esq., and Celeste E. Webb, Esq. Ms. McCoy is represented by William B. Gerwig, III, Esq.

On July 12, 2022, Ms. McCoy was seen by Prasadarao Mukkamala, M.D., for an independent medical evaluation (“IME”). Ms. McCoy complained of soreness in her neck, pain in the low back towards the left side, and pain and numbness in the left lower extremity. She also denied that she had suffered any prior injuries to her neck and back. Based upon his examination of Ms. McCoy, Dr. Mukkamala found that she had reached maximum medical improvement (“MMI”) in regard to her compensable lumbar and cervical sprain injuries, and he opined that she did not require any further treatment.

Using the American Medical Association’s *Guides to the Evaluation of Permanent Impairment* (4<sup>th</sup> ed. 1993) (“the *Guides*”) and West Virginia Code of State Rules § 85-20 (2006) (“Rule 20”), Dr. Mukkamala evaluated Ms. McCoy’s whole person impairment (“WPI”). Dr. Mukkamala found that Ms. McCoy had 1% WPI for range of motion loss. He further found that she did not qualify for impairment under Table 75 of the *Guides* because the compensable injury had not resulted in a specific cervical spine disorder. Applying Rule 20, Dr. Mukkamala placed Ms. McCoy in Cervical Category I of Table E of Rule 20 and adjusted her cervical rating to 0% WPI. For the lumbar injury, Dr. Mukkamala found Ms. McCoy to have 5% WPI under Table 75 of the *Guides* and 4% WPI for range of motion loss, for a total of 9% WPI of the lumbar spine. Applying Rule 20, Dr. Mukkamala placed Ms. McCoy in Lumbar Category II of Table 85-20-C and adjusted her lumbar rating to 8% WPI. Dr. Mukkamala noted that the lumbar x-ray showed spondylolisthesis at L4-L5. Dr. Mukkamala apportioned 5% of Ms. McCoy’s lumbar impairment to a preexisting, non-compensable degenerative condition, and the remaining 3% to the compensable injury, for a total of 3% WPI.

On July 25, 2022, the claim administrator awarded Ms. McCoy a 3% PPD award based on Dr. Mukkamala’s assessment. Ms. McCoy protested this order to the Board.

Four months later, on November 9, 2022, Bruce Guberman, M.D., performed an IME of Ms. McCoy. Based upon his physical examination of Ms. McCoy, Dr. Guberman found her to be at MMI in regard to her compensable lumbar and cervical sprain. Using the *Guides* and Rule 20, Dr. Guberman assessed a 4% WPI for the cervical injury using Table 75, and a 5% impairment for range of motion loss. Dr. Guberman combined these impairments for a total of 9% WPI of the cervical spine. Applying Rule 20, Dr. Guberman placed Ms. McCoy in Cervical Category II of W. Va. Code R. § 85-20-E and adjusted her cervical rating to 8% WPI. Dr. Guberman assessed 5% WPI for the lumbar injury under Table 75 of the *Guides* and 5% WPI for range of motion loss, for a total of 10% WPI in the lumbar spine. Dr. Guberman applied Rule 20 and placed Ms. McCoy in Lumbar Category II of W. Va. Code R. § 85-20 Table C and assessed her lumbar rating at 8% WPI. By combining Ms. McCoy’s lumbar and cervical impairments, Dr. Guberman found that she had a combined total of 15% WPI and recommended that Ms. McCoy be granted an additional 12% PPD award.

Dr. Guberman also reviewed Dr. Mukkamala's evaluation and report. Dr. Guberman opined that although Dr. Mukkamala had placed Ms. McCoy in Cervical Category I of W. Va. Code R. § 85-20 Table E, he believed that her non-verifiable radicular complaints of cervical pain radiating to her head and shoulders with associated numbness and tingling in her upper extremities qualified her for inclusion under Cervical Category II. Dr. Guberman also noted that Ms. McCoy's cervical range of motion was more limited during his examination when compared to the findings of Dr. Mukkamala. Dr. Guberman also noted that Dr. Mukkamala apportioned 5% of Ms. McCoy's lumbar impairment to preexisting degenerative changes. Dr. Guberman argued that apportionment for preexisting degenerative changes was not indicated in the claim because Ms. McCoy had no history of low back pain, loss of motion, radicular symptoms, functional limitations, or other impairment of the lumbar spine prior to the compensable injury of January 24, 2022. In the absence of such evidence, Dr. Guberman opined that there was no medical rationale for apportioning any of Ms. McCoy's lumbar impairment to preexisting conditions.

By order dated November 7, 2022, the Board reversed the claim administrator's June 14, 2022, order. The Board found that Dr. Guberman's impairment assessment was more persuasive and was based upon proper application of the *Guides* and Rule 20. Further, the Board cited this Court's ruling in *Duff v. Kanawha Cnty. Comm'n*, 247 W. Va. 550, 882 S.E.2d 916 (Ct. App. 2022), and noted that Dr. Mukkamala's apportionment was based solely on imaging evidence of preexisting degenerative changes as the record did not contain medical evidence of any diagnoses, treatment, range of motion loss, or impairment of the lumbar spine prior to the compensable injury. Based on the foregoing, the Board granted Ms. McCoy an additional 12% PPD award in addition to the previous award of 3% PPD, for a total award of 15% PPD. The Commission 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, the Commission argues that the claim administrator's 3% PPD award was appropriate based on the medical evidence and the compensable injury, that the Board erred in reversing the claim administrator's order, and that the Board's decision was clearly wrong.

The Supreme Court of Appeals of West Virginia has set forth that: "[t]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996).

In *Duff*, this Court found that:

The Supreme Court of Appeals of West Virginia has previously recognized that radiographic evidence of degenerative changes alone is not sufficient to allow apportionment for [a] preexisting injury. There must be something more, some evidence of detrimental effect on work or the activities of daily living. Where such evidence of impairment is lacking, the Court has found that apportionment was not appropriate. *See Galaxy Distributing of WV, Inc. v. Spangler*, No. 19-0803, 2020 WL 6559079 (W. Va. Nov. 6, 2020) (memorandum decision) (unanimous decision) (the Board did not err in finding that apportionment was arbitrary and speculative where preexisting changes to right shoulder did not appear to affect the claimant's work or daily activities); *Minor v. West Virginia Division of Motor Vehicles*, No. 17-0077, 2017 WL 6503113, at \*2 (W. Va. Dec. 19, 2017) (memorandum decision) (3-2 decision reversing Board of Review decision apportioning for preexisting condition) ("While the 2004 x-ray may have shown degenerative changes [to the right knee], those changes did not appear to affect Mr. Minor's ability to work or his activities of daily living. Therefore, we agree with the Office of Judges' findings that . . . apportionment of the impairment rating due to the 2004 x-ray was improper . . .").

*Duff* at 558, 882 S.E.2d at 924.

Upon review of the record, we cannot conclude that the Board was clearly wrong in reversing the claim administrator's order. The record indicates that Dr. Mukkamala apportioned 5% WPI of Ms. McCoy's lumbar impairment to preexisting degenerative changes, which could have only been based upon imaging evidence. As noted by the Board, the record does not contain any evidence of ongoing low back diagnoses, loss of motion, or lumbar impairment prior to the compensable injury. The Board found that Dr.

Guberman's report was more credible, because the amount of impairment that Dr. Mukkamala apportioned to preexisting conditions was not supported by the medical evidence. We agree. Accordingly, we find that the Board was not clearly wrong to grant Ms. McCoy a 15% PPD award based upon Dr. Guberman's findings.

Based on the foregoing, we affirm the Board's November 7, 2023, order.

Affirmed.

**ISSUED:** April 22, 2024

**CONCURRED IN BY:**

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