

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

**DOUGLASS CAREY,  
Claimant Below, Petitioner**

**v.) No. 24-ICA-436**

**(JCN: 2023020798)**

**AAA PAVING AND SEALING, INC.,  
Employer Below, Respondent**

**FILED  
June 6, 2025**

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

**MEMORANDUM DECISION**

Petitioner Douglass Carey appeals the October 8, 2024, decision of the Workers' Compensation Board of Review ("Board"). Respondent AAA Paving and Sealing, Inc. ("AAA") timely filed a response.<sup>1</sup> Mr. Carey did not file a reply. The issue on appeal is whether the Board erred in affirming the claim administrator's order, which denied authorization for a walk-in jacuzzi tub and shower, and replacement of Mr. Carey's front porch boards.

This Court has jurisdiction over this appeal pursuant to West Virginia Code § 51-11-4 (2024). 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. Carey was employed as a foreman by AAA. On May 8, 2023, Mr. Carey was admitted to Cabell Huntington Hospital with burns sustained when a dump truck hit a power line, knocking the transformer and high voltage power line onto the paver that he was operating. The incident caused second and third-degree burns over approximately 36% of Mr. Carey's body. A cervical CT showed possible rotary subluxation.

Cabell Huntington Hospital reports dated May 12, 2023, May 16, 2023, May 18, 2023, May 23, 2023, May 24, 2023, May 28, 2023, and May 30, 2023, indicate that Mr. Carey underwent multiple surgeries, including a right mid-forearm amputation for third-degree electrical burns to his bilateral upper extremities from his forearms to his fingers, abdomen, left back and shoulder, and bilateral lower extremities.

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<sup>1</sup> Mr. Carey is represented by Reginald D. Henry, Esq., and Lori J. Withrow, Esq. AAA is represented by Jeffrey M. Carder, Esq.

Mr. Carey completed an Employees' and Physicians' Report of Occupational Injury form on May 19, 2023. Mr. Carey indicated that he sustained various injuries while at work on May 8, 2023, but the worst injuries were to his hands, which required right hand amputation. The physician's portion was completed on the same date by medical personnel at Cabell Huntington Hospital. The nature of the injury was listed as electrocution, and the body parts affected were right body and entire body. The diagnoses were burn T30.0, trauma T1.90XA, and burn T31.32.

By order dated May 22, 2023, the claim administrator held the claim compensable for burns and trauma.

On October 20, 2023, Kelsey Parente, PA-C, prescribed a walk-in jacuzzi tub and shower for Mr. Carey as medically necessary for his care. On December 19, 2023, the claim administrator issued an order denying authorization for the walk-in jacuzzi tub and shower, and denying replacement of Mr. Carey's front porch boards on the basis that there was no medical evidence to explain why they were medically necessary. Mr. Carey protested this order.

Jennifer Lultschik, M.D., performed an independent medical evaluation ("IME") of Mr. Carey on April 29, 2024, at the request of AAA. Dr. Lultschik noted that Mr. Carey currently had a thirty-six-inch square shower that requires him to stand, and he would prefer a fixture that would permit him to sit on a shower chair and soak in a jacuzzi tub. Dr. Lultschik noted that since Mr. Carey's discharge from the hospital, he had been managing his shower hygiene with some assistance, without the onset of illness. Dr. Lultschik stated that with "the various means and implements available for disabled persons with limited mobility to reach their back and groin areas, [Mr. Cary's] continued use of his existing shower is both possible and practical." Dr. Lultschik concluded that it was not medically necessary or reasonable to replace Mr. Carey's existing shower and install a separate jacuzzi tub with a walk-in fixture.

Mr. Carey completed a notarized statement on July 30, 2024, which indicated that a walk-in jacuzzi tub and shower would enable him to clean himself safely and without assistance. The affidavit states that Mr. Cary cannot grip with his left hand, that he cannot use his prosthetic right hand in the shower, and that he is at risk of falling while bathing. Further, Mr. Carey stated that his nurse case manager indicated that his front porch boards need to be replaced because they are old.

On October 8, 2024, the Board affirmed the claim administrator's December 19, 2023, order, which denied the request for a walk-in jacuzzi tub and shower and replacement

of front porch boards because medical necessity was not established.<sup>2</sup> Mr. Carey 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.

Syl. Pt. 2, *Duff v. Kanawha Cnty. Comm'n*, 250 W. Va. 510, 905 S.E.2d 528 (2024).

On appeal, Mr. Carey argues that the Board erred because the walk-in jacuzzi tub and shower are reasonably required to assist in his quality of life following the compensable injury. Mr. Carey also argues that the replacement of the floorboards on his porch is medically related to the compensable injury, due to the elevated risk because of the compensable injury. Finally, Mr. Carey argues that the Board erred in relying on Dr. Lultschik's report. We disagree.

The claim administrator must provide sums for health care services, rehabilitation services, durable medical and other goods and other supplies and medically related items

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<sup>2</sup> The Board's order also affirmed the claim administrator's November 30, 2023, order, which denied the request for a neuro-ophthalmology referral, a magnetic resonance angiography ("MRA") of the brain, and an MRI of the brainstem as unrelated to the compensable diagnoses; and affirmed the claim administrator's December 12, 2023, order, which denied the request for authorization of the medication Norvasc (amlodipine) as unrelated to the compensable injury. Mr. Carey's brief makes it clear that this appeal is limited to the issues of authorization for the walk-in jacuzzi tub and shower, and replacement of the front porch boards.

as may be reasonably required. *See* W. Va. Code § 23-4-3(a)(1) (2005) and W. Va. Code R. § 85-20-9.1 (2006).

Moreover, as set forth by the Supreme Court of Appeals of West Virginia, “[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). With this deferential standard of review in mind, we cannot conclude that the Board was clearly wrong in affirming the claim administrator’s order, which denied authorization for a walk-in jacuzzi tub and shower, and replacement of Mr. Carey’s front porch boards.

Here, the Board concluded that the walk-in jacuzzi tub and shower were not medically necessary or reasonably required treatments for the compensable injury. The Board noted that the claim administrator initially denied the request for a walk-in jacuzzi tub and shower because Mr. Carey did not provide any medical rationale to establish that these requests are medically necessary as a result of the work injury. Further, the Board stated that although PA Parente prescribed the walk-in jacuzzi tub and shower for Mr. Carey, she did not provide information supporting the medical necessity of these requests. In her IME report, Dr. Lultschik concluded that the request was not medically necessary and reasonably required for the compensable injuries. Based on the foregoing, we conclude that the Board’s decision to affirm the claim administrator’s denial of authorization for the walk-in jacuzzi and shower is supported by substantial evidence.

Turning to the request for replacement of Mr. Carey’s front porch floorboards, the Board also concluded that this request was not medically necessary and reasonably required for the compensable injury. Mr. Carey acknowledged in his statement that his floorboards had been deteriorating for over twenty years prior to the compensable injury. Thus, we conclude that the Board’s decision with regard to the repair of the porch floorboards is also supported by substantial evidence.

Finally, Mr. Carey argues that the Board erred in relying on Dr. Lultschik’s report. The Board weighed all of the evidence in the record and concluded that Mr. Carey did not establish that a walk-in jacuzzi tub and shower and replacement of front porch floorboards are medically necessary and reasonably required treatments for the compensable injury. Further, although PA Parente prescribed the walk-in jacuzzi tub and shower, she did not provide any information supporting the medical necessity of these requests. Thus, we defer to the Board’s weighing of the evidence.

Finding no error, we affirm the Board’s October 8, 2024, order.

Affirmed.

**ISSUED:** June 6, 2025

**CONCURRED IN BY:**

Chief Judge Charles O. Lorensen

Judge Daniel W. Greear

Judge S. Ryan White