

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

**GEORGIAN AMERICAN ALLOYS, INC.,  
Employer Below, Petitioner**

**v.) No. 25-ICA-49**

**(JCN: 2022005124)**

**FILED  
June 27, 2025**

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

**MARK DAVIS,  
Claimant Below, Respondent**

**MEMORANDUM DECISION**

Petitioner Georgian American Alloys, Inc. (“Georgian”) appeals the January 2, 2025, order of the Workers’ Compensation Board of Review (“Board”). Respondent Mark Davis timely filed a response.<sup>1</sup> Georgian did not file a reply. The issue on appeal is whether the Board erred in reversing the claim administrator’s order, which granted a 10% permanent partial disability (“PPD”) award, and instead granting an additional 5% PPD award for a total PPD award of 15%.

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.

Prior to the compensable injury in this case, Mr. Davis was treated for bronchitis, sinusitis, rib, and thoracic pain on February 19, 1998. Later, on September 17, 2020, Mr. Davis was examined by Wesley Lieving, D.O., at Pleasant Valley Hospital. Mr. Davis’ visit problems were listed as essential hypertension, moderate persistent asthma without complication, asthma due to environmental allergies, and chronic right-sided low back pain without sciatica. Dr. Lieving indicated that Mr. Davis’ pulmonary issues were inactive/controlled.

---

<sup>1</sup> Georgian is represented by Jeffrey B. Brannon, Esq. Mr. Davis is represented by Edwin H. Pancake, Esq.

Mr. Davis was injured when he fell approximately thirty feet from a furnace, struck a pipe, and landed on an I-beam while employed as a maintenance worker for Georgian.<sup>2</sup> Mr. Davis was treated at Grant Medical Center on August 25, 2021. The claim administrator issued an order dated September 20, 2021, which held the claim compensable for broken ribs.

David Soulsby, M.D., performed an independent medical evaluation (“IME”) of Mr. Davis and issued a report dated January 17, 2023. Dr. Soulsby assessed left rib fractures, pulmonary contusion, and left intercostal nerve injury. It was noted that Mr. Davis’ rib fractures developed nonunion, and he underwent fusion surgery at the 10th and 11th ribs. Dr. Soulsby placed Mr. Davis at maximum medical improvement (“MMI”) and noted that he continues to have chronic pain that interferes with activities. Using the American Medical Association’s *Guides to the Evaluation of Permanent Impairment* (4th ed. 1993) (“*Guides*”) and Rule 20, Dr. Soulsby assessed Mr. Davis’ permanent impairment. Dr. Soulsby opined that Mr. Davis’ pulmonary function appeared to be normal and rib fractures were typically rated according to pulmonary function. For the intercostal nerve injury, Dr. Soulsby placed Mr. Davis in the middle range of Table 16 on page 149 of the *Guides* and recommended 10% whole person impairment (“WPI”). Dr. Soulsby stated that there were no preexisting or coexisting conditions that contributed to this impairment, so apportionment was not necessary.

On May 15, 2023, the claim administrator issued an order granting Mr. Davis a 10% PPD award. Mr. Davis protested this order.

Bruce Guberman, M.D., performed an IME of Mr. Davis on September 11, 2023. Mr. Davis reported that on August 25, 2021, he fell approximately thirty feet from a structure inside a furnace while replacing parts, and that after the first fifteen feet, he hit and bounced off a pipe and then fell another fifteen feet, landing on an I-beam. Dr. Guberman assessed history of left 10th and 11th rib fractures with nonunion, status post reduction internal fixation of left rib fracture nonunion at the 10<sup>th</sup> and 11<sup>th</sup> ribs with destruction by neurolytic agent of the left intercostal nerves 10 and 11, and status post left rib 10, rib 11, and rib 12 intercostal nerve block. Dr. Guberman placed Mr. Davis at MMI. Using Table 16 of the *Guides*, Dr. Guberman placed Mr. Davis in the category “patient can breathe spontaneously but has difficulty in activities of daily living that require exertion.” Dr. Guberman opined that Mr. Davis would be in the upper end of this category due to the interference in his activities of daily living and recommended 15% WPI. Accordingly, Dr. Guberman recommended that Mr. Davis receive an additional 5% PPD award in addition to the 10% PPD award he previously received.

---

<sup>2</sup> We note that the record does not contain an Employees’ and Physicians’ Report of Occupational Injury form.

On November 7, 2023, Mr. Davis gave a deposition regarding his claim. Mr. Davis testified that he did not return to work following the August 25, 2021, injury. Mr. Davis stated that he was no longer undergoing treatment for the injury, but he continued to have pain in his back and side daily. He indicated that the pain was worse when taking deep breaths, bending over, and turning to the side. Mr. Davis testified that he was a well-tender for seventeen years before he started working for Georgian in 2006. Prior to that, Mr. Davis testified that he worked as a laborer and in tomato fields.

On April 10, 2024, George Zaldivar, M.D., evaluated Mr. Davis at the request of Georgian. Dr. Zaldivar issued a report dated April 15, 2024, which stated that “[u]nfortunately, as in all [cases] of pain, it is something that is felt by the individual and cannot be measured.” Dr. Zaldivar noted that Dr. Soulsby and Dr. Guberman quoted from Table 16 of the *Guides*, which stated that “[p]atient can breathe spontaneously, but has difficulty in activities of daily living.” Instead of basing an impairment rating on Table 16, Dr. Zaldivar utilized his pulmonary function study and Table 8 of Chapter 5 of the *Guides*. Dr. Zaldivar opined that Mr. Davis would be between class 1 and class 2 based on the results of the breathing tests and recommended 5% WPI. Dr. Zaldivar then apportioned the entire 5% WPI to Mr. Davis’ prior smoking habit.

Dr. Soulsby was deposed on May 29, 2024. He testified that he was not provided with any medical records to review prior to his evaluation. Further, Dr. Soulsby stated that he rated Mr. Davis’ impairment under Table 16 of the *Guides*, determined that Mr. Davis had a 10% WPI, and believed that there were no preexisting or coexisting impairments that should be apportioned. Dr. Soulsby indicated that after reviewing Dr. Zaldivar’s report, he changed his opinion. Dr. Soulsby believed that his assessment of 10% WPI for pulmonary function related to chronic pain from the intercostal nerve was correct. However, he testified that he would apportion the 5% WPI found by Dr. Zaldivar to the preexisting conditions and 5% WPI to the compensable injury.

Dr. Guberman issued an addendum report dated August 21, 2024, after reviewing the reports of Drs. Zaldivar and Soulsby. Dr. Guberman questioned Dr. Zaldivar’s use of Table 8 of the *Guides*, and noted that although Dr. Zaldivar recommended 5% WPI, there was no 5% impairment mentioned in the tables he used. He stated that class 1 equals 0% WPI, and the next class has an impairment range of 10-25% WPI. Further, Dr. Guberman noted that Mr. Davis’ smoking history was less than a pack a day, starting when he was sixteen or seventeen years old, and stopping at age twenty-three. Dr. Guberman also noted that there is no history of pulmonary systems treatment, shortness of breath, or any other pulmonary symptoms prior to the compensable injury. Dr. Guberman indicated that Mr. Davis’ complaints of shortness of breath were directly causally related to the compensable injury. Further, Dr. Guberman opined that the entire 15% WPI was due to the compensable injury.

On September 3, 2024, Mr. Davis gave a second deposition regarding his claim. Mr. Davis testified that he started smoking cigarettes after high school, and that he smoked less than a pack per day for about ten years before quitting. When asked to describe his breathing problems prior to the August 25, 2021, injury, Mr. Davis stated that he did not have any unless he had the flu, a cold, or bronchitis. Mr. Davis denied having any trouble performing his work as a maintenance man due to shortness of breath or breathing problems prior to the injury. Further, he denied any limitation of functioning or pain that limited his ability to lift or carry objects prior to the injury. Mr. Davis testified that after the injury he does not engage in physical activity such as walking because it causes him pain.

By order dated January 2, 2025, the Board reversed the claim administrator's order granting a 10% PPD award, and instead granted Mr. Davis an additional 5% PPD award for a total award of 15% PPD. The Board concluded that Dr. Guberman's report and finding of 15% WPI are supported by the objective medical evidence. It is from this order that Georgian now appeals.

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, Georgian argues that the Board was clearly wrong in finding that Dr. Zaldivar's report was not reliable for the purposes of rating Mr. Davis' permanent impairment. Further, Georgian avers that the Board was clearly wrong in relying on Dr. Guberman's assessment of impairment. Georgian also asserts that the Board was clearly wrong in finding that apportionment was not appropriate in the claim. We disagree.

In Syllabus Point 6 of *Duff v. Kanawha County Commission*, 250 W. Va. 510, 905 S.E.2d 528 (2024), the Supreme Court of Appeals of West Virginia held that:

Under West Virginia Code § 23-4-9b (2003), the employer has the burden of proving apportionment is warranted in a workers' compensation case. This requires the employer to prove the claimant "has a definitely ascertainable impairment resulting from" a preexisting condition(s). This requires that employer prove that the preexisting condition(s) contributed to the claimant's overall impairment after the compensable injury and prove the degree of impairment attributable to the claimant's preexisting condition(s).

Here, the Board concluded that Dr. Guberman's report is supported by the objective medical evidence, and consistent with the *Guides*. Dr. Guberman, the Board noted, used Table 16 of the *Guides* to rate Mr. Davis' impairment related to the work injury. The Board found that Dr. Guberman's explanation that none of the permanent impairment should be apportioned because there was no history of any documentation of impairment related to a preexisting, noncompensable condition of smoking, with no history of prior symptoms related to limitations of functioning is reasonable and rational and supports the 15% WPI rating. On the other hand, the Board determined that Dr. Zaldivar's recommendation of 5% WPI, based on pulmonary function testing rather than Table 16 of the *Guides*, was not a valid and reliable rating because he used an inappropriate method to assess the impairment related to the compensable injury. Further, the Board determined that even assuming that a pulmonary function test was an appropriate method to rate the impairment in this claim, Dr. Zaldivar did not properly assess the amount of impairment in accordance with Table 8 of the *Guides*.

When considering Dr. Soulsby's report, the Board found that he, like Dr. Guberman, used Table 16 of the *Guides* to rate Mr. Davis' impairment. However, the Board determined that Dr. Soulsby's decision to apportion 5% WPI to Mr. Davis' preexisting smoking history was not appropriate based on the fact that he utilized Dr. Zaldivar's recommendation of 5% WPI for pulmonary function impairment, which is not a valid and reliable rating. Citing Syllabus Point 6 of *Duff*, the Board concluded that Georgian did not establish that Mr. Davis had a definitely ascertainable impairment from his smoking history based on a lack of documentation of his condition prior to the compensable injury.

Upon review, we conclude that Georgian did not establish that the Board was clearly wrong in finding that Mr. Davis is entitled to a 15% PPD award. 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

reversing the claim administrator's order and granting Mr. Davis an additional 5% PPD award for a total PPD award of 15%.

Based on the foregoing, we affirm the Board's January 2, 2025, order.

Affirmed.

**ISSUED:** June 27, 2025

**CONCURRED IN BY:**

Chief Judge Charles O. Lorensen  
Judge Daniel W. Greear  
Judge S. Ryan White